

Yours, Mine & Ours: Estate Planning for People in Blended or Step Families

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PLANNING YOUR FUTURE SERIES

ESTATE PLANNING FOR PEOPLE IN BLENDED OR STEP FAMILIES

YOURS, MINE & OURS



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Introduction

- The estate and charitable planning tools and techniques are included in an electronic book that Ed Morrow and I co-authored, entitled *The Estate Planner's Tool Book*, which actually contains two separate books, *The Estate Planner's Cheat Sheet*, which evaluates 55 estate and charitable planning techniques on the same 16 criteria, and a second book, entitled *A Method in the Madness: A Proposed Hermeneutic for Designing the Appropriate Estate Planning Technique*, and the book is available on-demand at: <https://new.leimbergservices.com/wdev/products.cfm?id=156> .

Agenda

- Clarifying the blended family makeup. Some statistics on how common blended families are in practice.
- Methods of Representation-Choose Wisely and Defensively.
- Preparing for Initial Meeting.
- Two Actual Cases on Modern Family Issues.
- Funeral Planning and Related Issues.
- Financial Powers of Attorney Issues.
- Health Care Powers of Attorney and Living Wills Issues.

Agenda (cont.)

- Marriage Contracts and Property Agreements.
- Closely-Held Family Business Issues in Blended Families.
- Joint Tenancies and Severing Joint Tenancies.
- Life Insurance and Life Insurance Trusts.
- Tangible Personal Property Issues.
- Conclusion.

Disclaimer About Forms

- The clauses contained herein are submitted for purposes of discussion in a continuing education seminar and are intended to provide general guidance and to spur thinking. They do not constitute, nor should they be treated as, legal advice regarding any particular estate planning technique, clause or form or the tax consequences associated with any such technique, clause or form. Forms and independent clauses are dangerous if swallowed whole or interposed into documents without careful evaluation of the consequences. ***My thinking can be no substitute for yours.***
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One Description of Second Marriage

Triumph of hope over experience.

~Samuel Johnson

Who

IS

The **M**odern Family?

- **Blended/step family couples-since the 2010 U.S. Census, the most common form of relationship.**
- **Same sex partners, including married, unmarried and those in civil unions.**
- **Unmarried couples-fastest demographic segment of the population**

Blended v. Step?

- While I often use the term “blended” to describe familial organizations where the romantic partners don’t share all of the children in the organization, you should first understand that some experts who work with or research so-called “blended families” vehemently object to the use of the term “blended,” as many of these familial organizations are anything but “blended” as the meaning of that term is commonly understood.
- Consequently, many only use the term “step,” but, for my purposes, the terms “blended” and “step” are synonymous.

Definition of “Blended/Step Family”

**At least
one partner has
at least one child
who is not child of
other partner.**

Clarifying the “Blended Family”

Blended Family Statistics:

- 62% of married/cohabiting couples under age 55 that have at least one living parent, the couple member and at least one adult child in the three generations have at least one step-kin relationship in the three generations.
- 1,300 new stepfamilies are formed every day.
- 65% of remarriages involve children from a prior marriage on at least one side, creating a blending family.
- 40% of married couples with children (i.e., families) in the US are stepcouples (at least one partner had a child from a previous relationship before marriage; this includes full and part-time residential stepfamilies and those with children under and/or over the age of 18).
- An estimated 113.6 million Americans have a steprelationship.
- Sources: <http://www.smartstepfamilies.com/view/statistics>; <http://brandongaille.com/20-noteworthy-statistics-of-blended-families/>

Clarifying the “Blended Family”

Blended Family Statistics:

- Approximately one-third of all weddings in America today form stepfamilies (demographic estimate, Deal). This includes first marriages - 15% of *first* marriages create stepfamilies.
- A national Pew Center report (Livingston, 2014) finds that 40% of all new marriages in the US are remarriages for one or both of the partners.
- 42% of adults (102 million) have a steprelationship (either a stepparent, a step or half sibling, or a stepchild).
- One-third of individuals who got divorced in 2008 were redivorcing, that is, divorcing again.
- And, of new marriages, 40% are remarriages (20% for one partner, 20% for both partners).
- Sources: <http://www.smartstepfamilies.com/view/statistics>; <http://brandongaille.com/20-noteworthy-statistics-of-blended-families/>

**Today, I'll Address
Selected Key Advanced Aspects of Estate
Planning for Blended Families.**

**I've Actually
EXPERIENCED
(Both Professionally AND Personally)
(Too) Many of The Issues
I'll Be Covering!**

- Each Family is Different
- Each Situation Requires Different Approach

Brady Bunch:

Widow and Widower
Both in 40's,
Each with three minor children
from prior marriages.

May-December Relationship:

Wealthy Widower - 80

3 Adult Children in their 50s,

Marries Woman 26

With 7 Year Old Daughter

Empty Nesters:

Widower – 72

Has Pension, Received Late Wife's Insurance

3 Adult Children

Marries

Divorced Woman – 72

3 Adult Children

No Assets Except Home

No Income Except Social Security

Eat, Drink and Remarry:

63 Year Old

One son

Large alimony obligations

3 Prior Marriages

marries

35 Year Old

Two-time divorcee

Two dependent minor sons

Same Sex Blended Family:

46 Year Old Woman

Marries

37 Year Old Woman

Both are Parents

One Divorced with 10 Year Old

One with Adopted Son - 18

Yours, Mine and Ours:

Man Age 43

Divorced

Marries

Woman Age 41

Each - Minor Child

Each - Joint Custody

Together – 7 and 3 Year Olds

Methods of Representation- Choose Wisely and Defensively

Methods of Representation

- Assuming that you're comfortable enough to represent a **couple**, how may you represent a couple?
- **Jointly**—where you won't keep secrets between the partners.
- **Separately**—where you treat each partner's secrets as if he or she was a separate client.
- And, of course, the couple may be represented by separate estate planners.

- Some conservative lawyers **won't** represent *couple* in blended family (will **only** represent one partner)
- **Shouldn't proper focus be on what is best for client?**
(I maintain answer is "YES!")
- Looking out for client actually is in estate planner's **long-term** best interest too:

(**Happy** clients pay and refer others;
unhappy clients more likely to **sue**,
less likely to **pay** and
very likely to **tell others** about bad experience)

Benefits of joint representation:

- **Cost savings (only one set of estate planners)**
- **Efficiency and synergies of effort**
- **Can better communication between partners**
- **Being treated as partners, not adversaries**

Benefits of separate representation:

- **Undivided attention and loyalty of estate planner**
- **Total freedom to say what client feels and wants to have done**
- **Lower chance of estate plan challenges**

Note: Doesn't eliminate challenges by surviving partner or partner's children

Signposts of need for *Separate* Representation

(Despite what they *say* that they want):

- **One partner is childless (partners usually have different loyalties)**
- **One partner does all the talking or seems to exert control over the other**
- **Short length of relationship**
- **Number of past relationships**
- **Significant age disparity**

- Significant disparity in wealth or income
- Economic **dependence** of one partner on the other used against him/her
- **Existence** of marriage contract or property agreement
- Information held by one partner **off-limits** to other partner, e.g., a secret, etc.

- Many prospects for potential conflicts of interest when drafting wills or trusts
- Major Issue: interpretation of marriage contract or property agreement
- Major Issue: How partners have maintained or Should maintain separateness of property

- **Right of partner in property of other partner in areas such as “equitable interest” or “quasi-community property”**
- **Keeping client confidences**
- **Any non-reciprocal will or trust provision that adversely impacts client’s freedoms to act or rights:**

Example: One partner appoints other to serve as fiduciary while other partner chooses someone *other* than partner

Bottom line:

- Practice **defensively** because modern family estate planning can be treacherous waters where storms can come up instantly and without warning! For example, the recent Wellin malpractice case. *Wellin v. Nixon Peabody, LLP*, 2021 WL 5445968 (11/22/21, 4th Cir. US Ct App.). If you become aware of an issue consider documenting it, and if severe, withdrawing.
- Nevertheless, trying to work within family system best where decision is to represent couple.
- Recognize clients have tough choices and act accordingly.

Preparing for Initial Meeting

How do blended family couples come to you?

- **Preexisting** relationship (personal or professional) with **one** partner but not other partner
- **Separate** preexisting relationships (personal or professional) with **each** partner
- **No preexisting relationship** with **either** partner
- **Beware:** *Any* past relationship potentially taints you-
(Technicalities rarely help those attempting to use them as shield)

How to handle initial conference:

- Meet with **each** partner **separately**
- Meet with **only one** partner
- Meet with **both** partners **at same time**
- Meet with **both** partners **together *and* separately**

I suggest:

- Meet with **both** partners, both **separately and together**
- I used to employ a two-step engagement process where the first phase was to evaluate whether I could ethically represent the couple jointly, while the second phase was the estate planning engagement.
- **Never** meet with *just one* blended family partner!

(Risk of being perceived as biased in favor of partner with whom you met too great!)

(Also risk undue influence claim)

Bottom line:

Practice **defensively**, especially when representing blended family couples, **or** risk being sued or serving as unpaid fact witness

Unhappy clients **more** likely to sue you,
more likely to talk negatively about you,
less likely to pay **you**

I've identified 12 distinct possible fears in estate planning, including:

- **Fear of estate planning process**
- **Fear of estate planners**

Result: Clients procrastinate (“planning paralysis”)

Result: Unforeseen results visited on blended families, particularly on couples not legally married.

Example: Health care situation - patient lacks health care power of attorney/advance care directive. HIPAA and privacy rights might freeze the partner out.

Why So Much Angst in Blended Families?

- Divisions based upon divided loyalties
- Children often grieving loss of parents' relationship
- Children often grieving loss of deceased parent
- Children stuck in “no one can replace momma”
- Children jealous of parent's new partner
- Distrust of new partner's motives

RESULT: New partner and children often
fear – despise – are angry at - each other

**Even in subsequent union,
should not be extended back-and-forth negotiations,
particularly through lawyers, over a marriage contract
or property agreement**

**Why? May undermine foundation of couple's
relationship**

**Psychological counseling or coaching
“helps facilitate resolution of disagreements”**

Leaving Money Wisely by David W. Belin

**Few estate planners
schooled in psychological and emotional aspects
of these discussions
(Goal is “win-win” for couple)**

Problem:

**Most lawyers/advisors see negotiations as
zero sum games in prenuptial agreements**

(Wrong-headed in our opinion)

Stephen Covey: *Seven Habits of Highly Effective People*

Two Actual Cases on

M**O**dern Family

Issues

- *Sindell v. Gibson Dunn & Crutcher*, 54 Cal. App. 4th 1457 (2nd Dis. 1997)
- Husband and wife had separate **grown** children
- Husband and wife were **separately** represented by counsel

- Husband hired law firm to coordinate transfer of interests in closely held entity (his separate property) to his daughters.
- Lawyers advised: Gift and sell entity interests to children.
- Lawyers did NOT advise him to get consent/acknowledgment of separate property (which he had inherited) from his wife.

- Wife had **independent** wealth.
- Wife was represented by **separate** counsel.
- Three years later, after wife become incapacitated, her children sued step-father to nullify transactions, asserting transferred property was **community property**.

- A year after wife's children filed suit to nullify gift/sale on grounds that some transferred property was wife's community property, husband's children sued **dad's** lawyers for malpractice for failing to get wife's consent to and acknowledgment of gift/sale.

- Trial court dismissed husband's children's action against husband's estate planning lawyers as premature since there was no damage yet - because lawsuit by wife's children hadn't been concluded.
- Second District reversed, holding the matter over for trial.

- Appellate court reasoned that damage in form of attorney's fees to **defend** against the action was damage in and of itself and remanded for trial.
- Case never reported again (Probably settled).
- Lesson: Even if **clearly** separate property (as seems to have been here), **get waiver!**
- As the late Myron Cohen would say, "It couldn't hoit!!!"

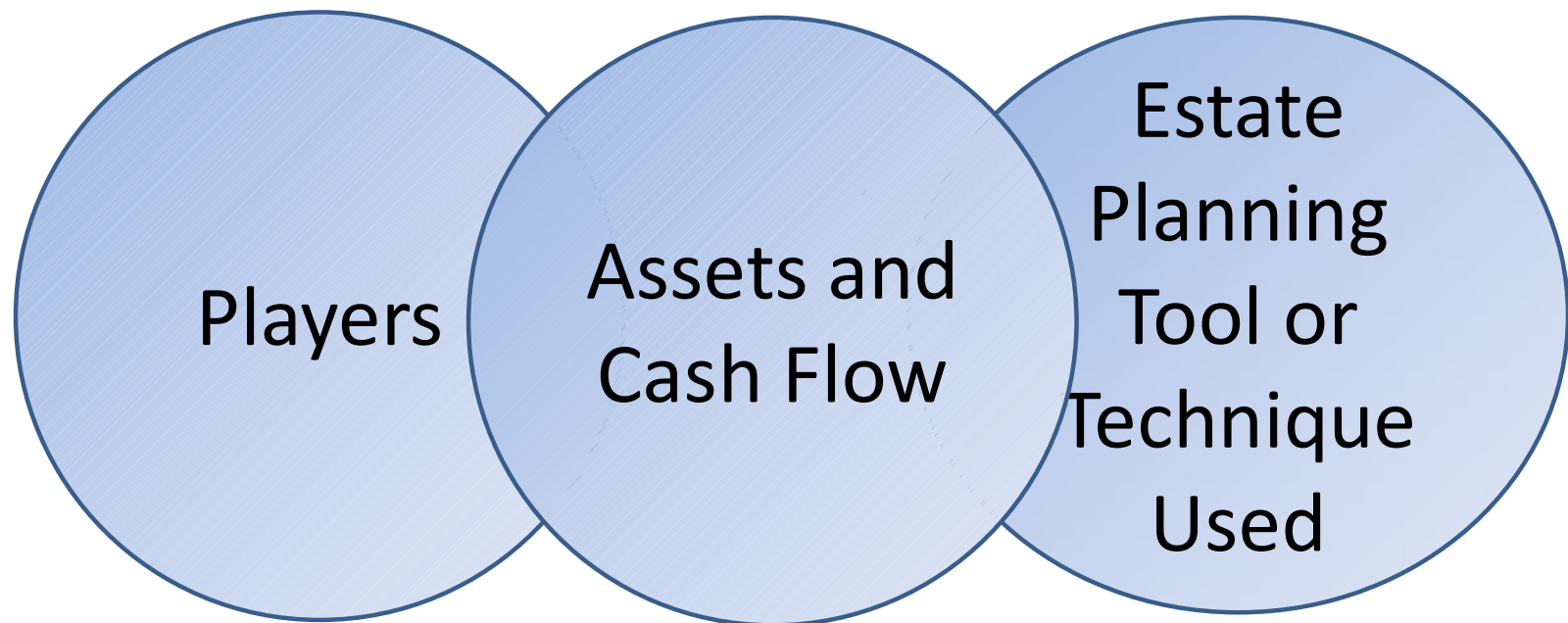
Smaldino v. Comr., T.C. Memo. 2021-127 (Judge Thornton November 10, 2021).

- In a gift tax case, Judge Thornton dealt with the proper gift tax characterization of a transfer of LLC class B nonvoting membership units to the Petitioner's spouse, followed by her purported retransfer of these same LLC units to a dynasty trust, and the fair market value of the LLC class B membership units that the Petitioner transferred, directly or indirectly, to a dynasty trust. Judge Thornton substantially ruled against the Petitioner on both issues. The case is appealable to the U.S. Ninth Circuit Court of Appeals.
- **Mrs. Smaldino's Applicable Exclusion Amount:** The practical effect of the Tax Court's opinion was to negate any taxable gift as having come from Mrs. Smaldino by expressly holding that the taxable gift of units of Class B nonvoting interests in Smaldino Investments, LLC by Mrs. Smaldino roughly equal to her entire applicable exclusion amount to the Smaldino 2012 Dynasty Trust to have actually been made indirectly by Mr. Smaldino.
- By virtue of the Tax Court's decision, does Mrs. Smaldino *automatically* get her entire applicable exclusion amount restored? Clearly, Mrs. Smaldino's gift tax return wasn't at issue in this proceeding, and Mrs. Smaldino wasn't a party to the Tax Court litigation, and, as such, wasn't impacted by the judgment. In our opinion, Mrs. Smaldino probably doesn't unless she took some timely independent steps. As noted above, Mrs. Smaldino's gift tax return wasn't at issue in this Tax Court case.

Smaldino v. Comr., T.C. Memo. 2021-127 (Judge Thornton November 10, 2021.

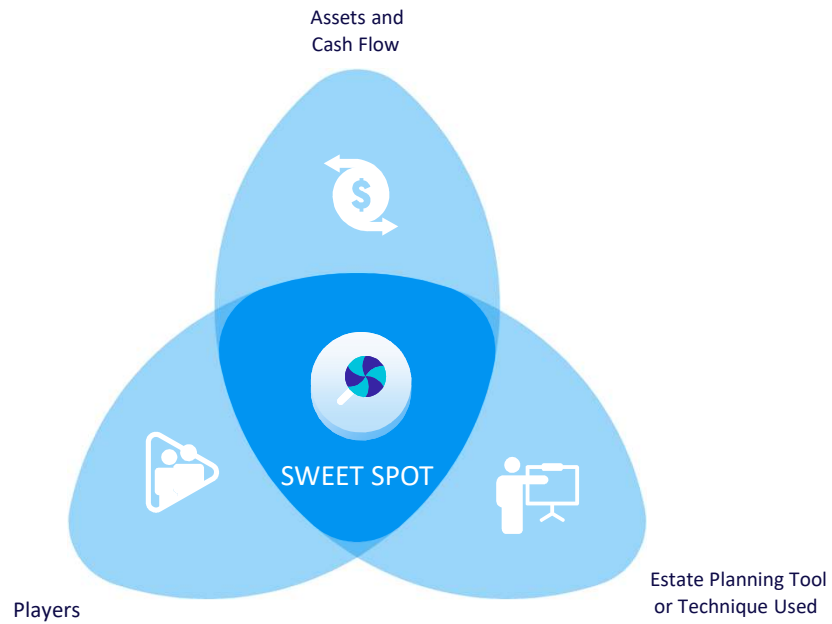
- **Ethics Issue:** Did the same lawyer represent Mr. and Mrs. Smaldino *jointly*? The facts are not clear about whether the same lawyer represented both Mr. Smaldino and Mrs. Smaldino, and if he represented both of them, if he did so *jointly* or *separately*. If the lawyer represented both of them, irrespective of the capacity, the lawyer's advice might be questioned on ethical grounds if the lawyer either recommended or advised the couple to engage in the transaction without pointing out the obvious risks to Mrs. Smaldino of the indirect gift position, which I believe should have been readily apparent to a competent estate planning lawyer.
- Mrs. Smaldino purported to virtually exhaust her entire then applicable exclusion amount on the gift to the Dynasty Trust. Given the time that has elapsed, it may already be too late for Mrs. Smaldino to reclaim her applicable exclusion amount, suggesting some malpractice damage.
- However, since Mrs. Smaldino is still living, it may be impossible to ascertain the damage. And it's entirely possible that if she dies with a total tentative estate (which would include her then applicable exclusion amount gift that she was unable to reclaim) of less than the federal estate tax applicable exclusion amount in effect at her death, then the tax element of the malpractice claim would be zero. But, as the appellate court pointed out in *Sindell v. Gibson, Dunn & Crutcher*, merely having to institute a claim created compensable damage.

Tour of Estate and Charitable Planning Tools and Techniques



The goal is to hit the “sweet spot” in the middle.

FINDING THE SWEET SPOT



One Trick Ponies

Estate planners should pay heed
to Maslow's admonition:
You can't be a "one trick pony."

More Quotes of the Day

- *If you can't explain it to a six year old, you don't understand it yourself.*
- **Albert Einstein**
- *Life is really simple, but we insist on making it complicated.*
- **Confucius**

And Still More Quotes of the Day

- *There is nothing which we receive with so much reluctance as advice.*
- **Joseph Addison**
- *Advice is what we ask for when we already know the answer but wish we didn't.*
- **Erica Jong**
- *Let's be careful out there.*
- **Mythical Sergeant Phil Esterhaus on the television series *Hill Street Blues***

Funeral Planning and Related Issues

- **Funeral services/rituals and burial/inurnment real hot button issues.**
- **Often create highly difficult emotional (downright caustic) issues in blended families (and result in difficulties for all involved in administration of estate or trust).**

Best Solution:

**Question and Counsel Clients,
Get Specific Wishes In Writing!**

- Counsel Clients to Make “death arrangements” in **advance.**
- Counsel Clients to be proactive and dictate in writing:
 - **who they want to be invited to funerals,**
 - **arrangements to be made, and**
 - **consider writing own obituaries.**

Financial Powers of Attorney Issues

Financial Powers of Attorney Issues

Modifications often are **necessary** to your regular forms for a blended family couple:

- The power of attorney should not permit an agent partner to significantly alter the principal's estate plan; likewise, the powers of an agent child should be similarly restricted.
- The limitations on the agent might need to be both **affirmative** and **negative** (negative) *e.g.*, restricting beneficiary changes and gifts that are not in accord with the principal's estate plan; (affirmative) requiring continuation of annual gifts, *etc.*
- In order to dispel uncertainty, the power of attorney should require the agent to give the children of the principal **access** to financial and medical information as well as physical access to the principal, or to the partner, if a child is the agent.

Financial Powers of Attorney Issues

- Modifications often are necessary to your regular forms for a blended family couple (cont.):
 - Should limit giving away precious family heirlooms (e.g., silverware, china and pictures).
 - Limit changing beneficiary designations.
 - Limit changing distribution provisions in IRAs and retirement plans.
 - Should automatically terminate on separation or divorce.
 - Should limit the exercise of powers of appointment.
 - Should not waive any accountings, and in fact should probably require periodic accountings by the agent.
 - Should affirmatively and broadly restrict self-dealing.

- Coordinate selection of agent with person(s) who will serve as executor or successor trustee to prevent contention between fiduciary positions, particularly if agent of deceased client has to give an accounting with decedent's estate.
- Beware of situations where same person is serving in both fiduciary positions (**no accountability**).
- Particularly important where persons from **different** sides of client's family serve as fiduciaries.

Health Care Powers of Attorney and Living Wills Issues

- **Paramount importance** to unmarried partners because of HIPAA privacy laws, particularly where client wants partner to make health care decisions.
- Consider allowing **access** to medical information and doctors to expanded group of people (Critical in a blended family if relations are strained or non-existent between two sides of family).
- Consider granting access to principal when incapacitated to specified group. (Critical where person in control is likely to try to limit access to principal).

- Decision to discontinue extraordinary life sustaining means is emotionally charged and often highly contentious.
- Consider giving **committee** selected from both sides of family that task.
- Alternatively, client could require agent to **confer** with certain family members.

Marriage Contracts and Property Agreements

Marriage Contracts and Property Agreements Generally

- Unmarried couples often effectively replicate the marriage contract in a property agreement.
- Ways to ensure that no changes are made to an estate plan of a partner during the surviving partner's overlife include the mutual will, contract to make a will and a marriage contract or property agreement, and I'll discuss each in turn:
 - In a **mutual will**, two (usually married) people execute one document that is binding on the first death of the couple and can't be changed during the surviving spouse's over life **only** if the couple executed an agreement (with consideration) to provide for such irrevocability at the first death-See, e.g., *Estate of Helen J. Collins*, 619 SE 2d 456 (1963).

Mutual Wills

- I find that mutual wills are, as one commentator put it, “litigation breeders,” especially in blended family couples, where after the death of a partner there may indeed be a strong willingness and reason to alter the dispositive provisions.
- There may well be a lot of pressure by the partner who expects to survive to receive rights to all of the property of the other partner.
- I prefer providing for these matters in a marriage contract or property agreement.

Contracts to Make a Will

- Contracts to make a will can take one of three basic forms:
 - A contract to make a particular gift.
 - A contract not to revoke a will or a provision therein.
 - A contract to make no will (i.e., to die intestate).
- These creatures differ quite a bit depending upon applicable state law.

Contracts to Make a Will

- Like all other contracts, these agreements require acceptance and consideration, and usually must be in writing.
- In blended family situations, it is rare to see such a contract separate and apart from a marriage contract or property agreement, but you do see them, particularly where a couple doesn't have a marriage contract or property agreement in place or where they're just dealing with one issue, e.g., portability.

Marriage Contracts and Property Agreements

- Whether the couple has a marriage contract or property agreement, the possibilities include:
 - No agreement.
 - Agreement to be totally separate in property.
 - Agreement to keep separate property (and the income therefrom) separate, but otherwise have a community property regime.
 - Agreement that has aspects of any or all of the above, but which gives explicit detail as to what a partner is entitled to on split-up.

Marriage Contracts and Property Agreements

- Marriage contracts and property agreements have become so common in blended family situations that they are almost the norm today—a corollary of the old adage “screw me once, shame on you; screw me twice, shame on me.”
- These types of agreements are attacked and broken often—given the higher incidence of dissolution in blended family couples, an estate planner must consider the agreement as subject to challenge.

Marriage Contracts and Property Agreements

- What are the warning signs of a potentially unenforceable marriage contract or property agreement?
- The problem is the frequency with which these agreements are attacked in divorce proceedings, such that the prudent estate planner must be circumspect about the validity of every marriage contract or property agreement.

Marriage Contracts and Property Agreements

- This is where, in my experience, the vast majority of blended family couples handle irrevocable estate planning, especially since it can be tied to termination of the union, which typically frees the partners from the limitations in the agreement.
- Typically, marriage contracts waive most if not all rights to serve as personal representative or trustee as well as the spousal election and homestead allowance.

Marriage Contracts and Property Agreements

- Typically, marriage contracts also waive:
 - All community property, quasi-community property, and quasi-marital property rights.
 - The right to a probate family allowance.
 - The rights or claims of dower, courtesy, or any statutory substitute.
 - The right to inherit property from the other by intestate succession.
 - The right to receive property that would pass from the decedent party by testamentary disposition in a will executed before the agreement.

Marriage Contracts and Property Agreements

- Typically, marriage contracts also waive (cont.):
 - The right to take the statutory share of an omitted spouse.
 - Any right created under federal law, including, without limitation, the Retirement Equity Act of 1984.
 - Any right, title, claim or interest in or to the property, income, or estate of the other by reason of the parties' non-marital relationship.
 - Any right to alimony or other maintenance.
 - A right to contest the other partner's estate plan.

Interpreting the Marriage Contract or Property Agreement

- These agreements are some of the most hotly contested contracts in the law because of the emotions behind it.
- If you didn't draft the marriage contract or property agreement (and sometimes even if you did), you will have to interpret and incorporate the estate planning related aspects of that agreement.
- This is a potential source of conflicts of interest, whether you drafted it or not: if you didn't, your call may adversely impact your client; if you did, you might have some malpractice exposure.

Marriage Contracts and Property Agreements-Portability

- Increasingly, marriage contracts are expressly addressing portability and who bears the expense of preparing and filing the federal estate tax return.
- The transferability of the applicable exclusion amount between married persons. It allows a surviving spouse to use the applicable exclusion amount that remains unused at the death of his or her predeceased spouse, in addition to his or her own applicable exclusion amount.
- Portability requires an election to be filed on a timely filed and properly prepared federal estate tax return.

Marriage Contracts and Property Agreements-Portability

- In blended families, it is important that the couple have a frank and honest discussion about portability.
- The couple should provide instructions relative to it in their estate planning documents and prenuptial agreements.
- There already have been reported cases in state courts regarding blended family clashes over portability. *See, e.g., In The Matter Of The Estate Of Vose, 2017 OK 3, Case Number: 115424 (Okla. January 24, 2017).*

Marriage Contracts and Property Agreements-Portability

- The use of portability with QTIP trust planning in subsequent marriages where the QTIP trust property is going to pass to the descendants of the first spouse to die could visit hardship and federal estate tax exposure to those descendants where the surviving spouse used some or all of the deceased spouse's DSUE Amount and didn't waive reimbursement of the federal estate tax on the QTIP trust, which few spouses in multiple marriage situations will do.
- The parties could agree to permit the surviving spouse to have the use of any DSUE Amount of the first spouse to die in return for an agreement that the surviving spouse would waive the right of reimbursement for tax due as a result of the inclusion of the QTIP trust in the surviving spouse's estate (or at least for that portion of the QTIP trust equal to the DSUE Amount).

Marriage Contracts and Property Agreements-Portability

Portability is not going away, so couples should provide for it. The parties could agree as follows:

- The first of the couple to die would require his or her executor to prepare and file a federal estate tax return and make the portability election.
- The surviving spouse would agree to pay all of the costs of preparing and filing the return to the satisfaction of the executor, who would agree to cooperate and provide all information concerning the deceased spouse's assets and liabilities.

Marriage Contracts and Property Agreements-Portability

The parties could agree as follows (cont.):

- The surviving spouse would agree to indemnify, defend and hold the executor harmless from and against any and all taxes, penalties and interest arising out of making the portability election.
- If a QTIP election is made on the estate tax return of the first spouse to die, the surviving spouse would agree to waive reimbursement of the federal estate tax attributable to inclusion of the DSUE Amount in the surviving spouse's estate in his or her estate planning documents and agree to pay that federal estate tax, together with penalties and interest, if the waiver is ineffective.

Closely-Held Family Business Issues in Blended Families

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Closely held business interests always challenging because:

- Liquidity and Non-diversification issues.
- Business management succession issues that cloud and increase complexity of estate planning issues—especially if children involved.
- Further complicated if owner partner earning livelihood from entity.

- Complexities magnified exponentially when blended family partner owns or co-owns interest in business.
- Issues differ depending upon when interest acquired.
- Working with blended family couples, expect to see much more separate property in closely held business interests, even in common law states, because partners bring these interests into the union.

- With Blended Families, buy-sell agreement is **necessity**.
- Owner partners should have non-owner partners sign at least acknowledgment of existence of buy-sell agreement.
- Owner partners married to non-owner partners should have non-owner partners be **parties** to buy-sell agreement.
- Provide for continuing ownership and control in owner partner upon dissolution of marriage or relationship whether during life or at death.

- Consider how to protect both assets and people.
- Consider employment agreements and “golden handcuff” arrangements.
- Important to keep children working **for** business instead of **competing** with it (particularly if they don’t get along with partner).

- When relations between children and surviving partner (e.g., stepparent) strained, parties forget (or ignore) their need for each other.

Example:

Assume surviving stepparent takes over business as trustee of decedent's trust that owns business interest. Assume surviving stepparent was not involved in business during deceased partner's lifetime. Survivor will need children who work in business.

Likewise, children who work in business need their stepparent, who is - like it or not—their boss. Obviously, problematic situation.

- Business owners must seriously and independently evaluate potential successors to run business.
- Too often, children don't have training, experience, will, or temperament to *run* business if parent dies.
- Too often, surviving partner doesn't have training, experience, will, or temperament to run business.

Family Business Issues

Consider a simple example: Pete owns the majority interest in a closely held business. Prior to marrying Rita, Pete gifted some shares to his son, Steve, who is being groomed to run and own the business and who works in the business, but Pete retained control—and Pete and Steve have a buy-sell agreement in place wherein Pete's estate will sell his shares to Steve, and Steve owns life insurance on Pete's life to pay the sales price. The couple live on Pete's substantial salary from the business. Pete's estate plan at present will hold his estate in a QTIPable trust for Rita and Steve, who don't really know or trust each other.

Family Business Issues

Key questions:

- Who should serve as Pete's executor?
- Who should serve as trustee of Pete's QTIP trust?
- Does Steve have a conflict of interest in serving as either executor or as trustee of the QTIP trust?
- Does Rita have a conflict of interest in serving as either executor or as trustee of the QTIP trust?
- If either has a conflict, do you solve it by suggesting that they serve as co-fiduciaries?

Family Business Issues

Who should serve as Pete's executor?

- Clearly, Steve would have a conflict in serving as his dad's executor, since he would be on both ends of the buy-sell transaction and thus could manipulate the deal to his benefit.
- On the other hand, Rita as executor could cause friction in the transaction and even endanger Steve's at-will employment prior to the sale since she and Steve neither know nor trust one another, so this is a situation that cries out for a third party executor, even if only for this transaction.

Family Business Issues

Who should serve as trustee of Pete's QTIP trust?

- Clearly, both Rita and Steve would have a conflict in serving as trustee of the QTIP trust, since there would be a substantial difference in investment philosophy—Rita favoring income and Steve favoring growth, so this again is a situation that calls for an independent third party trustee.

Family Business Issues

Could you solve the problem by making Steve and Rita co-trustees and co-executors?

- While this may work in theory, I've rarely seen it work well in action—it usually isn't wise to team up step-relations unless they really know, trust and get along well together—otherwise, you're likely to create a litigious standoff and a lot of extra court time.
- I recall a situation where, against legal advice, a client teamed up child from wife number one and wife number three as co-executors and co-trustees—after suing each other weekly for a year, the frustrated court removed them both and installed independent third party trustees and executors.

Irrevocable Life Insurance Trusts

Life Insurance and Life Insurance Trusts

- Single life coverage, whether it is whole life or term insurance, can be helpful in estate planning for blended families in lots of ways.
- Perhaps a father has minor children or a special needs child for whom he needs to provide.
- Or suppose that a partner wants to leave a valuable home to his partner that comprises a large part of his estate, but also wants to leave a significant inheritance to his children by a prior union.

Life Insurance and Life Insurance Trusts

- Single-life life insurance also could be used to create a stream of income for a surviving partner, while passing on other property (e.g., a family business or a family homestead or farm) to the children of the prior union.
- For blended couples who have their own children together (i.e., “ours”), single-life life insurance could be used to, for example, provide for the education and support of joint children, who are younger than the separate children of each partner.

Life Insurance and Life Insurance Trusts

- In second-to-die life insurance, the partners are not the beneficiaries, the children usually are, or a life insurance trust.
- In estate planning for blended families, a properly structured second-to-die life insurance policy can assist in the payment of the estate tax not only on the surviving partner's estate, but also on the amount of estate tax that was deferred from the estate of the first partner to die through the marital deduction, at least in estates of married partners.
- Again, there is no deferred federal estate tax to worry about for unmarried partners since deferral through the marital deduction is not available.

Life Insurance and Life Insurance Trusts

- Second-to-die life insurance is also not without its problems, although many of these problems can be substantially reduced by a carefully crafted policy from a solid life insurance company.
- Second-to-die life insurance is often suggested when only one partner is insurable. However, this often isn't a good idea, because that insurance can be more expensive than a single-life policy on the insurable partner, and there is no protection in case the healthier spouse dies first.

Life Insurance and Life Insurance Trusts

- Moreover, if the premium on a second-to-die life insurance policy is designed around the US gift tax annual exclusion gifts of both insured partners (\$18,000 per donee in 2024 and estimated to be \$19,000 in 2025), there usually is a problem at the death of the first partner to die because the deceased partner loses his or her gift tax annual exclusion gift right at death.
- This usually means that the surviving partner will have to supply all of the premiums with only one set of annual exclusion gifts to cover them, which requires the surviving partner to use his or her lifetime gift tax applicable exclusion amount, and when that is exhausted, start paying gift taxes.

Life Insurance and Life Insurance Trusts

- In a blended family situation, a surviving partner who has children of his or her own may balk at essentially giving the children of the deceased partner annual exclusion gifts to pay the annual premiums or, worse yet, paying gift tax for the privilege of making gifts to his or her stepchildren. As you can well imagine, that usually doesn't go over very well and usually doesn't happen.
- In blended families, life insurance trusts can be very useful, even for nontaxable estates. For example, a life insurance trust can be arranged to create an income stream for a surviving partner, with the principal going to children of the insured at the surviving partner's death.
- Likewise, a life insurance trust can be used to leave a significant sum to your children, freeing you to take care of your partner with your other property. It is critical that you select a third party as a trustee of a life insurance trust, especially for blended families.

Life Insurance and Life Insurance Trusts

- Many blended family clients begin believing that they can appoint a child from each of them as co-trustees, but we strongly advise against it unless those two children have worked well together in the past.
- Usually, a financial institution will decline to serve as trustee of a trust that holds nothing but a life insurance policy (although a financial institution may agree to serve after the insured's death if the policy was large enough to satisfy the bank's minimum requirements), so a suitable third-party trustee should be found.
- Preferably, this unrelated third party will have no bias against either your children or your partner. Again, neither of you, nor your children or even siblings, should serve as trustee of a life insurance trust that holds a life insurance policy on either you or your partner.
- If your client still insists on having family members or a partner serve as trustee of a life insurance trust, you should carefully spell out governance provisions, including tiebreaker provisions if you have more than one trustee, and in selecting successor trustees.

Life Insurance and Life Insurance Trusts

- In my experience, the likelihood of complaint by a set of beneficiaries about the trustee is much higher in a blended family. This is why it is so important to spend time on this part of the estate-planning process.
- In my opinion, the selection of fiduciaries (e.g., trustee, executor, personal representative, conservator) probably is the most important aspect of estate planning, especially for blended families, and woefully too little time is spent on this part.

Joint Tenancies and Severing Joint Tenancies

Traps of Joint Tenancies in Blended Family Couples

- As most estate planners know, many clients own property in joint tenancy with rights of survivorship solution without either knowing or intending it. Joint tenancy often is put in place by a title clerk who didn't know any better or what the clients wanted.
- Joint tenancy can destroy an estate plan, and can really be what the client doesn't want, particularly in a blended family situation. In the context of a blended family, this almost always means that the children and other loved ones of the deceased joint tenant will get ***nothing*** with respect to that property, which almost ***always conflicts*** with the intentions of the deceased joint tenant.
- I rarely recommend that couples, particularly those in blended family relationships, own property as joint tenants for the above reason, and we certainly recommend highlighting ***the dispositive effects of joint tenancy, which can result in effectively disinheriting the descendants of the first joint tenant to die.***

Traps of Joint Tenancies in Blended Family Couples

Joint tenancy severances:

- An estate planner who represents both partners may have an ethical or a prickly client-relations problem with recommending severance of a joint tenancy arrangement. This is clearly an area of potential conflict between the partners.
- This potential for conflict is because joint tenancy may actually work in favor of a **younger** partner, particularly one who is less wealthy than the other partner, because the younger partner is actuarially more likely to survive and get all of that property.
- Nevertheless, we usually recommend **severance** of joint tenancies for blended family couples, reasoning that, in reality, you never really know who will survive (we've been fooled too many times).

Joint Tenancies and Severing Joint Tenancies

Joint tenancy severances:

- An estate planner who represents both partners jointly may have an ethical or a prickly client-relations problem with recommending severance of a joint tenancy arrangement.
- This is clearly an area of potential conflict between the partners.
- There may be a significant enough age disparity between the partners that the younger partner, who actuarially stands the greatest chance to be the survivor, may be disadvantaged by severance.
- Nevertheless, I always recommend severance, reasoning that, in reality, you never really know who will survive (I have been fooled too many times).

Traps of Joint Tenancies in Blended Family Couples

Joint tenancy severances:

- One can sever a joint tenancy ***unilaterally*** without the other partner having to approve the change or even having to know about it.
- Again, this is a possible reason for clients to have ***separate*** representation by different lawyers, because an estate planner may be hamstrung by client relations or even ethical obligations to the other partner and unable to participate in severance without telling the other partner if the estate planner represents the couple (except in the rare circumstance where the estate planner represents each partner ***separately***).

Traps of Joint Tenancies in Blended Family Couples

Joint tenancy severances:

- This secrecy might be a signal that the union is not that solid. You may want to ask the partner what it is that has he or she feeling the need to act in secret.
- Perhaps it is justified because the other partner was asked and is being unreasonable. If that is how the partner sees it, ask them to consider for a moment what he or she would feel if the situation was reversed.

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Joint tenancy severances:

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- If one of the partners still believes that he or she should go forward in secret, I strongly recommend encouraging them to consider the ramifications of their partner finding out that they've gone behind his or her back.

Tangible Personal Property Issues

Tangible Personal Property Issues

- This is a **real** hot button issue—and a source of potential complaint against estate planners if this isn't adequately addressed in the documents.
- While it is generally not necessary to address tangible personal property in detail and with much attention, blended family estate planning is the exception to this rule.
- In blended families, these issues often are not carefully addressed in estate planning. As a result, the surviving partner gets this property even though the deceased partner may have understood that the surviving partner would give the family property to his or her children, but there is no guarantee that this wish will be honored.

Tangible Personal Property Issues

- If there is any advice that I would give about this type of property, it is to consider having the client give it to the persons that the client wants to have it during his or her **lifetime**.
- This category can create significant litigation **even if the property is not worth much financially**. This category of property includes things like family pictures and other family memorabilia, furniture, jewelry, crystal, silverware and china.

Conclusion

Thank You!!!

- Comments? Questions?
- I'd love to hear from you! paul@paulhoodservices.com
- There's lots of helpful information, including downloadable articles, checklists and forms, as well as information on how to order all of my books at my website:
www.paulhoodservices.com
- Thank you for your time and attention! I hope that I was of assistance to you in helping a client **today!**