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An Overview of Estate Planning for Blended Families

An entry-level primer to ensure planners are addressing the special considerations of families in second (or later) relationships.

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Blended families come in a variety of configurations. On one end of the spectrum the clients may be Mike and Carol Brady. On the other end of the spectrum the clients may be Anna Nicole Smith and J. Howard Marshall. Many factors must be considered in a practitioner's approach to estate planning for blended families including, but not limited to, the duration of the marriage, the ages of each client, the number of children from prior marriages or relationships, the number of children from the current marriage, the net worth of the clients individually and collectively, how assets are titled, and how the clients approach their marriage and their family. Because the circumstances of each blended family can differ so significantly, it is impractical to cover the intricacies and nuances of estate planning for each individual set of facts. Consequently, this article shall serve as a 30,000-foot view to offer tools for the estate planner's toolbox to address many of the issues that may arise in estate planning for blended families.

Conflicts of Interest and Representation Considerations

Practitioners must determine whether they want to, or even can, represent one or both spouses for estate planning. Special attention must be paid to the factors listed above, as well as the dynamics of the marriage and the family. It is necessary to assess whether the couple's interests are aligned or whether they have differing goals. It is often best practice to spend time with the clients discussing these issues at the outset. If the practitioner ultimately represents both spouses in a blended family, an abundance of caution should be used and detailed waivers of conflicts of interest should be secured. It is also probably unwise to represent both spouses for estate planning purposes if you represented one of them with the respect to the preparation and execution of a prenuptial agreement between the two of them. Practitioners should also be mindful of obligations in connection with legal representation of a spouse's heir.

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Intestacy, Omitted Spouse, and Elective Share

It is critical that clients initially understand the results of inaction. If a testator executed a Last Will and Testament *before* marriage, but then subsequently dies before having the opportunity to revise his or her Will, either by Codicil or by executing a new Will, and also fails to provide for his or her surviving spouse, then there is generally a legal presumption that the testator intended to provide for his or her new spouse in his estate plan, but failed to do so before his or her death. The so-called "omitted spouse" or "pretermitted spouse" generally refers to a spouse who marries *after* his or her spouse created a Will.

Historically, an omitted spouse statute was intended to provide a safety net for a surviving spouse who was unintentionally disinherited after years of marriage but was dependent on the other spouse. For example, suppose that Alex creates a Will for the benefit of his two children on January 1, 2019. On December 1, 2019, Alex marries Rebecca, but shortly thereafter, Alex dies in a car accident on January 1, 2020 before revising his Will to provide for Rebecca. Rebecca is an "omitted spouse." Depending on state law, Rebecca would be entitled to inherit from Alex's estate under the laws of intestacy. In other words, if the Will was revoked as to the surviving spouse, the surviving spouse is entitled to his or her statutory share of the deceased spouse's probate estate.

Nevertheless, the law provides that the omitted spouse doctrine is merely a legal presumption of a testator's intent which may be overcome by facts and circumstances. If a testator provided for his or her spouse by transfers outside the Will (e.g., life insurance, retirement assets, etc.) and the beneficiaries under the Will can demonstrate that the intent was for the spouse to receive such assets in lieu of testamentary provisions, then the spouse will not be entitled to receive a share under the Will. For example, did the testator wish to disinherit the new spouse by clearly stating that the spouse was omitted from his or her will when the testator was considering marrying the spouse; or did the testator simply fail to revise his or her Will before death? A general disinheritance clause which provides that the testator specifically disinherits all future spouses will likely not be adequate.

For those individuals who have children from a prior marriage who intend to leave their entire estate to their children, merely omitting their spouse from their Will may be insufficient to protect the assets meant for their children. Moreover, many states have revised their laws to reflect the use of trusts as a will substitute and included revocable trusts within the definition of an omitted spouse. The clients must understand that despite these documents, the surviving spouse may nevertheless have a "right of election" or claim for an "elective share," which under state law allows a disinherited spouse to inherit a certain portion of the deceased spouse's estate despite the fact that he or she may have been specifically disinherited by the deceased spouse.

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Despite the foregoing, clients should understand that certain assets do not pass under a Will, but pass by operation of law. For example, joint property will pass to the surviving joint tenant and assets that pass by beneficiary designation (e.g., retirement accounts and life insurance) will pass to the designated beneficiary. Additionally, the application of any state community property laws should be examined.

Prenuptial Agreements

All marriages eventually end in one of two ways – divorce or death. While premarital or prenuptial agreements ("prenups") are often viewed by clients as protection in the event of divorce, they should also govern what happens in the event of death. Therefore, the estate planning process for a blended family can actually begin before the marriage is even solemnized.

At its heart, a prenup is nothing more than a negotiated contract which sets forth the parties' *minimum* obligations to one another in the event of divorce or death. When drafting a prenup, a scrivener must take great care in clearly defining the various types of property, how that property is divided upon the termination of the marriage and any additional obligations that one spouse may owe to the other. Litigation may result if the definitions or terms of the agreement are ambiguous or unclear.

In most, if not all, states the validity of a prenup requires full disclosure of the parties' premarital assets, debts, and income. The agreement should segregate those assets into categories called separate property and joint property because, typically, in the event of death, the surviving spouse will keep all of his or her own separate assets and succeed to all of the joint assets, while the deceased spouse's separate assets will pass to his or her estate or named beneficiary. The estate would then fulfill any specific obligations to the surviving spouse set forth in the agreement. Therefore, clearly defining those assets is essential in a prenup.

Defining each party's premarital separate property is the easy part; it is all property that each party acquired prior to the contemplated marriage. However, premarital separate property does not stay frozen in time once the parties are married.

It can appreciate or depreciate, produce income and/or return on investment, be sold or exchanged, cause additional property to be acquired, or be converted into different property through purchase or investment. These changes to premarital separate property should be addressed in the agreement as well.

Additionally, the parties are likely to acquire additional assets after the wedding, including salary/wages (which may also include contributions to a retirement plan), inheritance, and gifts. Like premarital separate property, these assets may produce income or change over time. The parties need to determine how the acquisition of additional assets will be treated for purposes of the prenup, i.e., whether they will be considered separate or joint property.

After defining and segregating the various types of property in the agreement, it is important that the parties determine how the property is divided and distributed upon the termination of the marriage (via death or divorce) and whether one spouse will owe the other any additional obligations. For example, the agreement may provide that upon the first spouse's death, all of his or her separate property (as defined in the agreement) passes to his or her children from a prior marriage via an implemented estate plan, all of the surviving spouse's separate property is retained by him or her, and all of the joint property is retained by the surviving spouse as well. The agreement may further provide that the surviving spouse is entitled to a lump sum payment of a fixed amount or an amount equal to a percentage of the fair market value of the deceased spouse's separate property (valued as of the date of death). It may even be an increasing amount over time depending upon the duration of the marriage.

As discussed above, one of the purposes of a prenup is to set forth the parties' *minimum* obligations to one another in the event of divorce or death. Therefore, as a necessity to the agreement, the parties must waive any rights at law they may have as to the estate of the first spouse to die, including all rights of election, inheritance under intestacy and interest in community property.

Segregation and Titling of Assets

Even with a prenup and/or a carefully constructed estate plan in place, the responsibility falls on the clients themselves to ensure that their intentions are carried out. Events during the regular course of life may unintentionally alter the plan. For example, separate property may be comingled in a joint account for convenience, accounts may be opened or closed, new life insurance policies may be purchased, or retirement accounts may be established requiring a beneficiary designation.

Revocable trusts are a convenient tool to segregate assets. Having assets titled in, or payable to, a revocable trust offers an extra level of protection through ease of identification. The client will often think twice before taking assets out of an account titled in the name of a trust. Additionally, the use of a trust helps to remind clients that specific assets (as well as the growth on such assets) are segregated for a specific reason and purpose.

Planning Opportunities

Estate planning in the 21st Century is complicated enough for a "traditional" married couple with mutual children. However, when you take into consideration families with children from prior marriages, the issues can be even more difficult. Blended families may consist of a husband and wife, or spouses of the same sex, as well as each spouse's children from previous marriages, and potentially, common children from the marriage. Blended families can often provide challenging estate planning opportunities for practitioners. Simple, "sweetheart wills" which distribute assets upon the death of the first spouse to the surviving spouse and then to the couple's children equally may often work in a first marriage; yet, such plans often do not achieve a client's desired results in a blended marriage.

In a second (or subsequent) marriage, a spouse is often torn between providing for their current spouse and the needs of their children. Each spouse may have children from previous relationship, as well as children together. In addition, they may have property and other assets that they have brought into the relationship. In many cases, the client's children often fear that the current spouse will exhaust their inheritance, while the current spouse often fears that they need to be protected and have sufficient assets in the event of death. This is particularly the case if the spouse and the children do not have a good relationship. In a perfect world, a testator could leave everything to their spouse and trust that their spouse will leave the balance of their estate to the testator's children under the spouse's Will. This, however, is not a viable option for a litany of reasons, including that the spouse may decide to entirely disinherit the predeceased spouse's children or squander the inheritance. Moreover, as individuals age, they become more susceptible to the influence of others and jointly designed estate plans may be changed. Today, many clients seek guidance on how to provide for their current spouse, partner, or significant other after their death while still providing an inheritance to their children from a prior marriage or relationship.

Taking care of the surviving spouse and then children. Practitioners often find that spouses want to take care of each other first and then their respective children after the death of both of spouses. While this is not always the case and one or both spouses may wish to leave his or her separate property to their respective children sooner rather than later, the vast majority of clients are concerned with providing that the surviving spouse has the use and benefit of the couple's assets after the first death.

Example 1: Joseph, age 55, and Harriet, age 53, have both previously been married and both have children from a previous marriage. Joseph and Harriet have managed to accumulate approximately $5 million of assets, including the value of their home during their lives. The couple's bank accounts are held jointly; however, title to the marital home is in the husband's sole name. Both wished to create a "simple estate plan" and agreed that, upon the death of the first spouse, the survivor should have complete and total access to all the couple's assets. When they executed Wills in 2017, shortly after they wed, they agreed that the surviving spouse should receive all assets outright. While both parties agree that the survivor should receive total access to the assets, they completely disagree regarding the disposition of the assets at the second death. Harriet believes that all the assets should be distributed amongst the children equally while Joseph believes that his assets should be distributed to his children and Harriet's assets should be distributed to her children. Anything owned jointly should be split equally. While the couple's goals are initially the same, the couple's goals differ completely after their deaths (and the attorney may wish to consider sending the couple to different attorneys because of the inherent conflict of interest).

Initially, Joseph and Harriet must be reminded that the surviving spouse may revise his or her estate plan at *any* time after the death of the first spouse. In fact, the surviving spouse may decide to reduce or eliminate any distributions to the deceased spouse's children.

Alternatively, Joseph and Harriet may wish to consider trust planning to achieve the desired result. Practitioners can assist their clients with their conflicting needs by creating a QTIP trust. The QTIP has many significant advantages over alternative planning opportunities, such as power of appointment trusts and leaving assets outright to the surviving spouse, including flexibility in postmortem planning and creditor protection. Perhaps, most importantly, the QTIP trust provides the testator with the ability to control the disposition of property after the death of the surviving spouse without violating terminable interest rules[1] and eliminates any concern that the surviving spouse will remarry and divert the property to the spouse's heirs or beneficiaries. As a result, if the assets remain in trust, the client can be assured that they will be available for the surviving spouse (and ultimately the children of the predeceased spouse) even if the surviving spouse ends up married/divorced in the future or with creditor problems. The trust for the surviving spouse is established so that he or she is the only beneficiary as long as he or she is still living. At the death of the surviving spouse, any assets which remain in the trust will pass as the predeceased spouse initially intended – to his or her own children, to all the combined children, or through some other combination. The surviving spouse may distribute his or her own assets as he or she wishes; however, they are not given the ability to modify the terms of the QTIP trust or determine what will happen to the assets in the trust.

In this example, if Joseph predeceases Harriet and establishes a QTIP trust for Harriet's benefit, Joseph can control the disposition of his property after Harriet's death, which is desirable since he has children from his prior marriage. Under the terms of the QTIP trust, Harriet will be named the primary beneficiary of the assets in the trust for her life, and Joseph's children (or other beneficiaries) will be named as the

1 Section 2056(b).
2 Section 2056(b)(7)(B)(ii))(I).
3 Section 2044.
4 Section 2056(b)(7).
5 Treas. Reg. section 20.2056(b)-5(f)(4)(5).

remainder beneficiaries following the termination of Harriet's interest. Under the terms of the trust, Harriet would have the use of the assets of the trust during her lifetime, but at her death, the trust principal would pass to Joseph's children, not Harriet's beneficiaries (including, a potential new spouse).

The QTIP requires that Harriet shall be paid all of the fiduciary income of the trust.[2] This requirement creates competing interests between Harriet, who would prefer the funds to be invested in income producing assets, and Joseph's children, who would prefer the funds to be invested in assets which will grow in value. To eliminate the family dynamics and these competing interests, Joseph may opt to utilize a QTIP with a unitrust payout. A unitrust distributes a fixed percentage (e.g., 4%) of the fair market value (valued as of a specific day) to Harriet each year. Irrespective of whether Harriet needs the unitrust distribution or requires more, she will receive 4% of the trust assets each year. If the trust earns greater than 4% in one year, the additional growth will be added to principal. On the other hand, if the trust only earns 3% or less in a given year, Harriet will still receive a guaranteed 4% payout. Since the use of the unitrust eliminates the conflicting interests of the primary beneficiary and the future remainderman, Joseph can be sure that both Harriet and his children are adequately cared for and there is no infighting about the investments.

The use of a QTIP trust does not eliminate the estate tax, it simply defers the estate tax until the death of the second spouse.[3] If a QTIP trust is created and no estate tax is due upon the second death, then the assets are simply distributed pursuant to the terms of the trust. A QTIP trust qualifies for the federal estate tax marital deduction, which permits all property, regardless of value, to pass to a surviving spouse free of estate tax. In order for a transfer to qualify for the QTIP marital deduction:

1. the property must be included in the surviving spouse's estate;
2. the property must pass from the decedent to the surviving spouse;
3. the surviving spouse must receive qualifying income for life with the income being paid at least annually;
4. no person may have a power to appoint any part of the property to any person other than the surviving spouse (but the surviving spouse may be granted a power to appoint the property after death); and
5. QTIP treatment must be elected on the estate tax return.[4]

In addition, the property subject to the QTIP election must be income-producing property or the surviving spouse must have the right to convert the property into income producing property.[5] The decision to include QTIP property in the gross estate of the surviving spouse is made by the executor of the decedent's estate, who may or may not be the spouse. To create the QTIP trust, the executor must make a "QTIP election" on the estate tax return which is filed for the estate of the first spouse to die, which provides flexibility. If the QTIP election is not made, then the QTIP property is subject to tax at the death of the first spouse.[6]

Following the death of the surviving spouse, questions often remain pertaining to the ideal option to distribute assets to the couple's children. In the example above, Joseph and Harriet have each agreed that the surviving spouse should receive total access to all the couple's assets; however, they disagree with the overall distribution of the couple's assets at the second death. While Harriet believes that the couple's assets should be distributed amongst the children equally, Joseph believes that each spouse's assets should be distributed to the spouse's respective children, while joint property should be distributed equally. The essential question then becomes, how to achieve the best result for the family.

If the family has decided to distribute any assets that the spouse has brought into the marriage to his or her own children, then a QTIP trust provides an optimal mechanism to ensure that this result occurs. Following the surviving spouse's death, the QTIP trust will provide that any assets that remain in trust will be distributed to the deceased spouse's children, while the surviving spouse can leave any assets in his or her own name to his or her own children through their own estate planning documents. This plan provides an ideal result since it ensures that the surviving spouse has access to all the income during his or her lifetime, with principal (as needed), while also providing that the principal will be distributed to predeceased spouse's children.

Some blended families take the approach that they wish to benefit all of the children equally, regardless of who brought any specific assets into the marriage. This may occur when one or more of the children are children of the marriage, or in longer relationships where the children have developed close ties to both spouses. If Joseph and Harriet decide on this distribution scheme, the QTIP can still be utilized to ensure that the children of the first spouse to die would not be disinherited. While the residue of the QTIP would be split among all the children in equal shares, the trust can provide an initial "true up" pecuniary distribution to the children of the predeceased spouse. The distribution would be equal to (i) the amount which the surviving spouse's children receive from the surviving spouse's estate (and possibly gifts made during life) reduced by (ii) the amount which the predeceased spouse's children receive from the surviving spouse's estate. Such a distribution would equalize the inheritances of all the children to the greatest extent possible.

Children receive assets following death. Many spouses enter a second (or subsequent) marriage with their own assets and their own children from a prior relationship. The couple may or may not have children together. While the couple may have vastly different amounts of wealth, the couple has decided to distribute his or her own wealth to his or her own children, with the other spouse's children receiving only whatever assets the other spouse brings into the relationship.

Example 2: John and Carol, age 75 and 70, respectively, recently wed a few months ago and have decided to execute new estate planning documents. They entered into a prenuptial agreement prior to their marriage in which they have each waived the elective share in the other spouse's estate, but have no other requirements upon death. John's net worth is approximately $11 million, he has been married twice and has three children from his previous marriages. On the other hand, Carol is a widow, with a net worth of approximately $2 million and one child from her marriage of 35 years. The marital home is in joint name and they have a small bank account that is owned jointly. John and Carol have not decided how they want to handle the marital home and joint bank account, but have indicated that it is their intent to leave his or her own wealth to his or her own children, with the spouse's children receiving only those assets that the spouse brings to the marriage.

Since John and Carol intend to leave their separate assets to their respective children, it is imperative that each keep their assets separate during their respective lifetimes and not commingle their assets. John and Carol should have their estate planning documents drafted as if they were single with children so that their assets will pass to their respective children upon death. John and Carol may also consider using revocable trusts in the estate plan to help ensure that any premarital assets (and the growth on the premarital assets) are kept segregated. A funded revocable trust can also reduce the risk of a challenge against the deceased's estate since it can be more difficult to challenge a trust than a Will. In any case, following the death of both John and Carol, their individual assets will pass to their respective children. Since they have executed a prenuptial agreement and they have waived the elective share, there is no requirement to leave minimum amount to the surviving spouse and all individually owned assets can pass however they wish.

On the other hand, since assets that are titled jointly (as is common on most real estate deeds) become the property of the remaining tenant upon the death of the owner, the owners must be cognizant of the distribution of estate assets. Any assets that are owned jointly pass by operation of law and outside the terms of a Will. Therefore, John and Carol's marital home and joint bank account will pass under the terms of the surviving spouse's estate planning documents, which may be changed after the first spouse dies. This is likely not their intent. Even happy couples who indicate that they trust their spouse to "do the right thing" and take care of the deceased's children fol-

6 Section 2044.

lowing their death have reservations when it comes to the marital home. A common alternative is to (i) provide a life estate to the spouse (or reciprocal life estates), (ii) revise title to tenants in common or (iii) transfer title to the home to a trust. As discussed below, each option has potential advantages and disadvantages and should be further discussed with the client.

Spouse and children each receive assets. If one or both spouses wish to leave some assets to the surviving spouse at the first death and some assets to the children, then the desired result can be accomplished through several different mechanisms, depending on exactly what the clients' desire.

If the intent is for the surviving spouse to receive certain assets or a specific share of the estate at the death of the first spouse, then this can be handled through an outright bequest of assets from the estate, a lump sum distribution of life insurance proceeds, or receipt of retirement benefits to the spouse at the first death. The advantage of this approach is that the surviving spouse does not have any restrictions on how he or she utilizes any share of an estate that he or she receives, such as a restrictive QTIP trust, and he or she does not have to deal with the opposing interests of the deceased spouse's children. Alternatively, the spouse could be named as a joint owner of the couple's assets and receive such assets outright following death by operation of law. Assets which pass to the surviving spouse under a right of survivorship are typically immediately available to him or her. The children would then receive the balance of the deceased's estate or any other non-probate assets. The client should be reminded that any time that an asset passes to the surviving spouse outright, the surviving spouse may distribute the asset to his or her own children, to the detriment of the predeceased spouse's children.

Alternatively, if the intent is for the surviving spouse to receive assets through a trust, then a QTIP trust for the benefit of the surviving spouse (as discussed above), coupled with specific bequest (either outright or in trust) to the children may be utilized. While doing so, the practitioner must make sure that each spouse will have enough assets to fund the individual bequests if he or she dies first. The practitioner should be aware that the couple's assets may or may not provide the optimal benefit for providing a bequest to the children at the first spouse's death. Depending on the client, life insurance, retirements accounts, or other assets may be a better option for funding such distributions and the practitioner should review the entire portfolio in consultation with the client's financial advisor.

It is important that the parties determine how the property is divided and distributed upon the termination of the marriage (via death or divorce) and whether one spouse will owe the other any additional obligations.

Planning with life insurance. Life insurance planning is an essential component of estate planning and can also solve many problems associated with planning for blended families. Often, life insurance is used to provide immediate liquidity to the family of the deceased. Even families with a sizeable net worth utilize life insurance to provide liquidity to the family for one or more reasons, including paying any estate tax owed, providing for beneficiaries (including children, a spouse, charity, etc.), providing liquidity in the event that the deceased owns a closely held business interests or ensuring that one or more loved ones have adequate means for care.

In many cases, the most logical owner of the insurance is an ILIT. An ILIT can be established to own an insurance policy during the client's lifetime and distribute the proceeds to the beneficiaries named in the trust when the insured party dies. For blended families, an ILIT may be used to provide children with life insurance and use the remaining estate to provide for the spouse. In its simplest form, the trustee of the ILIT purchases a life insurance policy on the client's life and the client pays the premiums. The ILIT offers two major advantages, namely, (i) it prevents children from being disinherited because the trust names them as the beneficiary of one or more life insurance policies and (ii) the children will receive an inheritance promptly because the policy will pay the trust immediately upon the client's death. The spouse may then receive the balance of the client's estate outright. This "compromise" is often used since the spouse and children are each accounted for following death. Moreover, if designed properly, the use of the ILIT effectuates estate tax-free treatment of the policy's death benefits.

Marital home. Often, a remarriage involves a jointly owned home, and this can eventually create tension between the surviving spouse who needs to continue living in the home and the children of the deceased spouse who want their share of the inheritance. Depending upon the laws of the couple's state of residence and how the property is titled, the desire of one spouse to leave their home to their children upon their death could be disturbed. In most states, property is purchased as "joint tenancy with right of survivorship" or "tenancy by the entirety." In this case, upon the death of the first spouse, the surviving spouse then owns the entire property. Therefore, following the death of the surviving spouse, the terms of his or her Last Will and Testament will govern how the residence will be distributed. In the case of a second marriage, the surviving spouse may leave the home to their own children, to the detriment of the predeceased spouse's children. This could frustrate the predeceased spouse's intent to leave the home to his or her own children. On the other hand, if the property is titled as "tenancy in common," each spouse has an undivided one-half interest in the home. This means each spouse has control over one-half of the home.

A remarriage often involves a jointly owned home, and this can eventually create tension between the surviving spouse who needs to continue living in the home and the children of the deceased spouse who want their share of the inheritance.

In other cases, the primary residence is titled in one party's individual name. This can become problematic since the predeceased spouse's interest in the home may pass to their children and not to the surviving spouse who has been living there, unless the deceased makes certain arrangements. As the home's owner, the predeceased spouse may pass title to the home to anyone that he or she chooses.[7] As such, careful thought must be given to the surviving spouse's living arrangements upon the death of the property owner.

The most common solution to home ownership, whether involving joint ownership or ownership vested solely in the name of one party, is the use of a life estate. A life estate provides the surviving spouse with the right to stay on the property for his or her life. He or she is the de facto owner until their death. Thereafter, upon the subsequent death of the survivor, the home will pass to the deceased children or other beneficiaries of the first to die. However, this approach could have unintended consequences, including tax consequences. Additionally, the family would be unable to sell the home or otherwise use it, even if the survivor gets remarried, moves away, or winds up in a nursing home.

An alternative to the life estate is to leave the home to a residence trust for the benefit of the surviving spouse. A trust could provide the surviving spouse with the right to occupy the residence until (i) his or her death, (ii) remarriage, or (iii) voluntary (or involuntary) vacancy of the home for a defined period of time. This would provide the adult children with a mechanism to sell the home. They would not need to wait until the surviving spouse's death. The terms of the trust would also dictate whether the spouse could rent the home and use the income from rent, as well as determine who is responsible for paying the maintenance and taxes on the property. Following the surviving spouse's death, the house would be sold, and the proceeds could be split equally or unequally between the children, or given entirely to one spouse's children. The practitioner may craft the trust in any manner without restriction.

Other Considerations

Beneficiary designations. One often overlooked item after remarriage is updating beneficiary designations on retirement accounts and life insurance policies. Following death, whomever is listed as the beneficiary on an account will receive the benefits- a beneficiary designation supersedes any estate planning intentions specified in estate planning documents.[8] Even if an estate plan provides that following the husband's death all of his assets are distributed to his wife, if the majority of the husband's assets are in his individual retirement account (IRA) and he has named his children from a prior marriage as the beneficiary, then the husband's children are entitled to the IRA (subject to a state's elective share requirements). Estate planning cannot fix incorrect beneficiary designations, and at the very least, practitioners should remind clients to review those designations after a change to their plans. Practitioners must also ensure that their clients name a primary and secondary beneficiary on their plans. When a contingent beneficiary is not named, the plan doc-

7 If the decedent was married at the time of his or her death, some states may limit their ability to distribute the primary residence to anyone other the surviving spouse.

8 Subject to certain state law restrictions which override the payment of any proceeds to a former spouse following a divorce.

uments will likely dictate who receives the plan assets. This may result in unfavorable consequences. Depending on state law, a former spouse may still be the beneficiary of a life insurance policy or retirement account as a result of a divorce, or the beneficiary of a spouse's ILIT, which may contain language that specifically names the spouse as the beneficiary. Careful consideration must be taken with respect to beneficiary designations and a full review of a client's accounts must be made.

In a blended family, one or both spouses may have a sizable retirement account, such as an IRA. While it is common in first marriages to name the other spouse as the primary beneficiary and the children as the secondary beneficiary, this can lead to a variety of problems in a blended family.

Example 3: Paul is the owner of an IRA which currently has a value of $1,000,000. He has decided to name his new wife, Rachel, as the primary beneficiary, and his four children from a prior marriage as the secondary beneficiaries. Therefore, under the terms of the plan, if Rachel predeceases Paul, the children will equally split the IRA. Paul's ultimate "goal" is for the remaining IRA balance to pass to Paul's children at Rachel's death.

While there are many flaws with the strategy, the primary issue is that Rachel can withdraw the entire $1,000,000 at once, pay the applicable income tax, and then either spend the money and/or give it to her own beneficiaries. Likewise, Rachel, as the surviving spouse and sole beneficiary of the IRA can roll over the entire IRA into her own IRA and name her own beneficiaries (including her own children from a prior marriage). In both scenarios, Paul's children may never receive a penny from his IRA.

To avoid this outcome, Paul may consider naming both Rachel and his children as equal beneficiaries of his IRA (or dividing his IRA into two separate IRAs). While Paul must be cognizant of the SECURE Act and the requirement that his children must withdrew the entire amount of his IRA by December 31 of the tenth anniversary of his death (subject to certain exceptions), the division of the IRA upon his death ensures that his children will receive some assets following his death. Alternatively, Paul can leave the entire $1,000,000 IRA to Rachel, who can roll the plan into her own IRA and leave other assets to his children (such as life insurance and taxable accounts), depending on the size of his estate.

While the simplest way that a beneficiary may receive an inheritance is to receive it outright via a Will or trust, another mechanism is to name the child as a beneficiary of all, or a portion of, any assets that are not governed by the Will. Such assets may include the account owner's IRA, 401(k) or insurance policies. Although the laws governing ERISA plans dictate that a current spouse must be the beneficiary of a 401(k) plan unless he or she legally agrees not to be the account holder, IRAs do not provide the same restrictions and an account owner may name anyone, including children, as a beneficiary *without* spousal consent.

Life insurance is also a valuable tool and can provide a mechanism to solve many problems, including ensuring that the spouse or children receive a fair share of the estate. For example, many couples use life insurance to provide an inheritance to the children at the first death and then leave all other assets to the spouse. However, the couple must be cognizant to ensure that the life insurance premiums are always paid and do not lapse. If the policy lapses, the children will not receive any insurance proceeds.

Accidental disinheritance. Practitioners must remind clients that a couple who decides to use joint ownership with rights of survivorship or payable on death account designations as a means to transfer assets to the surviving spouse (or any other beneficiary) must be extremely careful in order to avoid unintentionally disinheriting a beneficiary. Typically, a married couple may use a joint account, beneficiary designation, and/or a Will to leave everything to a spouse. Following the first spouse's death, the surviving spouse would therefore inherit everything, but what happens if the spouse remarries?

Example 4: Robert and Samantha have been married for 20 years with two children when Robert suddenly dies of a heart attack. Fortunately, the couple thought that they planned for this situation since all accounts and their marital home were owned jointly and they left Robert's retirement account and life insurance proceeds outright to Samantha. Five years later, Samantha met and married Todd without a prenuptial agreement in place. During her marriage to Todd, Samantha tried to keep her money separate from his.

A married couple commonly uses a joint account, beneficiary designation, and/or a Will to leave everything to the surviving spouse. Following the first spouse's death, the surviving spouse would therefore inherit everything, but what happens if the spouse remarries?

After a number of years, however, their assets were fully commingled. For convenience purposes, Samantha even added Todd to her checking and investment accounts, and named Todd as the primary beneficiary of her Will. Upon Samantha's subsequent death, her children were left without any inheritance. All her assets (including Robert's assets) were left to Todd. Money and property that were initially intended by Robert for his children never reached them.

Situations like Robert and Samantha arise daily. Estate planners must consider all aspects of a client's life. When there are children of a prior marriage involved, the estate plan must address the situation accordingly. Assets which are subject to beneficiary designations or joint ownership should be closely monitored to ensure that the client does not accidentally disinherit his or her spouse, or children.

Choosing the trustee. Coordinating fiduciaries is especially important in blended marriages. Trustees will manage the trust property, make sure that the surviving spouse is complying with the terms of the trust and ultimately determine whether any distributions of trust principal should be made from the trust. Not only must the estate plan coordinate with existing premarital and post-marital agreements, but they often involve conflicting interests, especially if the spouse has a long-life expectancy. For example, a surviving spouse may wish to have the assets invested conservatively, ensuring he or she has enough money to live comfortably for a long life, while the children, particularly if they are young, may be interested in riskier investments, which may offer better returns, but do not provide as much income to the surviving spouse on an annual basis. For these reasons, the practitioner should advise the client that they may want to consider an independent, third party trustee for trusts which are drafted for the benefit of the surviving spouse during his or her lifetime. The neutral trustee can balance the interests of the children with those of the surviving spouse.

Obligations from a prior marriage. When representing clients who have been married more than once, practitioners should inquire as to whether there are any existing obligations resulting from a divorce. For example, a client may have alimony or child support obligations or may be required to leave a certain amount of assets to his or her children from the first marriage in trust during the child's minority. Moreover, the client may be required to secure those obligations with a life insurance policy. Practitioners should ensure that these obligations are met so that the estate plan is not frustrated by potential lawsuits against the estate.

Revising ancillary estate planning documents. While revising a Last Will and Testament, reviewing beneficiary designations and coordinating benefits are extremely important in a blended family, spouses must also review their durable power of attorney and health care proxy following marriage. Practitioners must ask the client whether they have updated their durable power of attorney and health care proxy, to confirm whether the former spouse, children, or a third party has the authority to handle the client's finances and make medical decisions for the client when they are no longer able to manage their affairs. Remarriage requires reviewing a client's ancillary documents, since such documents will control end of life decisions, who visits the client when they are ill, and who makes financial decisions for the client. It may also be necessary to ensure that prior documents are revoked, and the appropriate financial institutions are alerted to such revocation.

Conclusion

Estate planning for blended families has a lot of moving parts and requires detailed attention to each client's individual circumstances. There is no cookie cutter approach. Practitioners need to have in depth conversations with clients regarding their wishes and play out all the varying consequences of each recommend planning strategy, considering the potential order of deaths, the differences in treatment of children, imbalances in wealth and needs of a surviving spouse. ■