

## ESTATE PLANNING COUNCIL

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### Panelists:

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*Our goal for today is to highlight issues which all of us need to address with our clients - issues which arise in all of our disciplines. Optimally, we raise the issues in the family's planning stages, to avoid dealing with them in the family's crisis stages. The issues aren't limited to the 5 family profiles we highlight today, but raising and dealing with them are more acute in these families.*

### Family profile #1 - Single- no children

- A. What is driving the client's plan?
  - a. Worry about maintaining her own financial independence because she has no kids to care for her in her old age
  - b. Might be less concerned with financial, estate and/or Medicaid planning if she doesn't have financial responsibility towards anyone.
  - c. Reducing potential tax liability may be less compelling than giving up control (i.e. Medicaid trusts or CRTs)
- B. Need more information about personal network – “families of choice”.
- C. More ambivalent about “after-death” planning than “later in life” planning.
- D. Ask about extended family (both biological and by-choice) and are they part of the plan.
- E. Discuss philanthropy.
- F. Retirement account planning.
  - a. With no family beneficiaries, she might not have thought about naming a beneficiary and doesn't understand the implication of not naming a beneficiary.
  - b. Explain about the benefits of naming a charity as beneficiary.
  - c. If client is divorced, must review and probably update ownership forms and beneficiary designation forms.
- G. Possible on going insurance needs - long term care, health and life.
- H. Income tax planning still possible and important. 2017 vs. 2018

## **Family profile #2 - Single parent with minor children**

### **A. Guardianship issues**

- a. Need to name a guardian to take over parental role at death:**
  - i. Differences between naming a guardian in a Will vs. using a Deed of Guardianship.**
  - ii. Different planning problem when the child's other biological parent is alive but possibly not suitable. What is suitable?**
- b. Opportunity to name a standby guardian to assist parent while parent is alive.**
- c. Who decides on the guardian if client/parent doesn't offer an opinion?**

### **B. Financial planning for the minor after decedent's death**

- a. Discuss managing the money of a minor:**
  - i. Court appointed guardian of the property**
  - ii. Parent appointed custodian under the UTMA**
  - iii. Parent appointed Trustee of a trust.**
- b. Benefits of using a lifetime trust instead of a testamentary trust.**
- c. Need to deal with all of client's assets passing by operation of law (life insurance, retirement accounts, etc) to avoid a court-appointed guardian of the property.**
  - i. Option: Name a custodian under the UTMA. Some institutions will not permit this. Change institutions? Read the institution's documents. Push back if appropriate.**
  - ii. Option: Create a trust and name a trustee. Creates its own difficulties. Trust might not be suitable to receive retirement benefits.**

### **C. Estate planning for the client.**

- a. For all clients but particularly the single client (never married, widowed or divorced), need to review title to accounts and beneficiary designations because the beneficiary designations might need to be changed.**
- b. For divorced clients**
  - i. Don't count on the law of NYS to make sure the ex-spouse is not going to inherit the balance in a joint account or your life insurance. Verify that title to assets was changed in accordance with the Agreement or Judgement of Divorce.**
  - ii. Also change beneficiary designations on all retirement accounts even if beneficiary doesn't change; many institutions nullify any beneficiary designation when married client divorces. Lack of a Designated Beneficiary precludes "stretch" IRA, among other potential issues. Be mindful of changes in Alimony rules under new tax laws.**
- c. Explain the problems with jointly owning assets (avoiding probate may seem like a good idea, but raises issues of gifting, cost basis, the joint-owner's access to client's assets, the joint-owner's creditor's access to client's assets). Verify whether client really intends for joint owner to inherit the account at death or whether client intended it to be an account of convenience.**

- d. Review all documents: Will, health care proxy, power of attorney, gifts rider, lifetime trust vs. Will planning, partnership agreements, trusts created by client's parents f/b/o client and/or her child.
- D. Financial planning for the single person.
  - a. With only one income, need to plan.
  - b. 529 accounts vs. trusts w/ discretionary distributions.
- E. Tax planning for the single person.
  - a. Deductions, child care credit, income tax based on occupation and entity planning.
  - b. What is the impact of the newly-revised 'Kiddie Tax'?

### **Family profile #3: Married Same-Sex Couple**

- A. General thoughts (raised here but this applies to all families - all clients). Make no assumptions about:
  - a. First and foremost: Who is the client? The pitfalls of joint representation of a couple (married or not).
  - b. Language. How do the clients refer to themselves? What is the importance of asking? How do clients deal with their families of origin? Be sensitive. Many couples are not used to openly discussing relationship – used to hiding – may not readily volunteer all of the relevant information
  - c. Clients' knowledge regarding
    - i. Spousal rights and responsibilities (obligations to support, marital property, right of election).
    - ii. For income tax planning, the marriage penalty. For estate tax planning, the unlimited nature of intraspousal gifts and bequests.
    - iii. The precise meaning of legal jargon: issue, jointly-owned, tenants in common, marital property.
    - iv. The legal status of their children (or the children of one spouse) in NYS and outside of NYS.
    - v. Gifting opportunities. How couple handles current finances and financial responsibilities to each other.
- B. Legal and moral obligations to prior partners and/or former spouses.
  - a. There may be unusual arrangements which might still be part of each other's lives. Might be a need to make non-binding agreement binding, or not.
  - b. There may be parental obligations to children outside of the marriage.
- C. The children (hers/hers and theirs or any variation on the theme).
  - a. What is the legal status of the children? Who is the parent of each child and based on what legal theory?
    - i. Option: Child born while the parties were married to each other. This

- might or might not be sufficient if the parents move out of NYS.
  - ii. Option: Child Adopted. By which parent? Born to one and adopted by the other parent?
  - iii. No legal status at all but clients uses the term to denote “who cares for whom”, not “who is legally responsible to/for whom”.
- b. Adoption Tax Credit.
- c. Possible incorrect use in legal documents of the terms “my children”, “my issue”.
- d. The legal status of the child comes up in many and numerous places:
  - i. In divorce or separation, issues are raised in custody and visitation (including grandparent visitation or non-biological parent visitation).
  - ii. In estate planning, (and in wrongful death actions) issues are raised: does the child have a statutory right to inherit from the adult and does the adult have a statutory right to inherit from the child? Is the child a distributee who can upset client’s estate plan?
  - iii. Who is legally responsible to support the child? Who pays the child’s debts? Who is legally responsible for the child’s illegal acts? Who pays for the nanny and for college?
  - iv. Who is entitled to enroll the child in school? See school records? Sign consent forms? Obtain medical information?
  - v. For tax purposes, issues are raised with regard to income tax deductions, the child care credit.
- e. Verify legal status of children –
  - i. [https://www.familyequality.org/get\\_informed/resources/equality\\_maps/joint\\_adoption\\_laws/](https://www.familyequality.org/get_informed/resources/equality_maps/joint_adoption_laws/)
  - ii. [https://www.familyequality.org/get\\_informed/resources/state\\_lgbtq\\_family\\_law\\_guides/](https://www.familyequality.org/get_informed/resources/state_lgbtq_family_law_guides/)
  - iii. Some children may have only been adopted by one parent because of bias or restriction that may never have been rectified.
  - iv. Couples who have children during marriage may assume that they are both the parents of the child. That is not settled law in NYS, and it is certainly not true in other jurisdictions. A child who is deemed the child of both parents in NYS may not have the same protections outside of NYS - and neither do his parents. Discuss option of second-parent adoption to lock in parental status. New Appellate Division case in the 3<sup>rd</sup> Dept. Christopher YY (January 2018) or 1<sup>st</sup> Dept *Matter of Maria-Irene D* (2017) are great in NYS but may not ensure child’s legal status in other states (or other jurisdictions).
  - v. Planning opportunities. Draft your documents carefully. Do not rely on the statutory definitions of terms of art like “issue” and/or “children”. The drafter should re-define the terms or just “name names” to ensure that the client’s estate passes to the people client thinks of as her children or issue. Consider who client wants to appoint as guardian of the person. Might want to plan for visitation by the “other side”.

**D. The clients' relationships with their respective families and with their spouse's families**

- a. Will intrafamily disputes interfere with estate planning? How?
- b. Even if the couple is married, are they out? And to whom? Will they have a problem filling out beneficiary designation forms at their HR offices?
- c. Even though spouses have legal obligations to each other and spousal benefits, the professional should still address the extended families to see if the families will make trouble for a surviving spouse. Passing title via a lifetime trust might be a better planning tool than a Will.

**E. Financial planning**

- a. May be more difficult to model in financial planning software, such as MoneyGuide Pro
- b. Are there any financial commitments or obligations that may or may not be "official"/enforceable but still need to be planned for?
  - i. <http://www.citypages.com/news/minnesota-mom-sues-to-redefine-paternity-in-lesbian-child-support-clash/451152873>
  - ii. Legal obligation to support prior partner (partnership agreement)?
- c. Consider pre-nups and post-nups. Sample sex couples divorce too.

F. We're discussing married couples here, but protecting the partners who are not married is much more complicated and at least as necessary (trusts, partnership agreements, jointly owned property, health care docs, powers of attorney). Consider partnership agreements for non-married partners.

**G. What are tax implications?**

- a. What is filing status? Joint vs. Married Filing Separate.
- b. Who claims the children for Exemption purposes for 2017 and credit purposes only for 2018?

**Family profile #4: Second Marriage**

**A. The children. His/hers or theirs? It makes a difference.**

- a. Who has a legal obligation to whom? Are there ongoing financial support obligations. Read the documents (divorce decree, separation agreement, court orders, partnership agreement, anything and everything).
- b. Will second spouse adopt first children? Will first spouse cede custody to second spouse? Who has adopted whom?

**B. The ex-spouse.**

- a. Are there ongoing financial support obligations.
- b. Read the documents (divorce decree, separation agreement, court orders, partnership agreement, anything and everything). Sometimes matrimonial attorneys refer to a trust to accept life insurance proceeds to be used for the

benefit of the children. Make sure there is a trust created to receive the proceeds.

**C. Estate planning.**

**a. Does client gift?**

**i. What drives giving?**

**ii. Is there a conscious effort to give equally? Is giving based on relative financial status at the beginning of the second marriage?**

**iii. A same-sex couple, like an opposite-sex couple, may have children from previous relationships who they care for but to whom they may have no legal connection but that still need to be included in current gifting and estate planning.**

**b. Thoughts about distributions at death of the first-dier and the second-dier.**

**i. The conflicts of providing for the “second spouse” and the “first children”. Some couples are very clear, others have never given it a second thought.**

**ii. Remember that even if a couple both want to provide for all of their respective children, and they both write Wills with these provisions, a Will is revocable and surviving spouse can easily and quickly change his/her Will to disinherit first-dier’s children. If the couple wants to require parity between/among all of the children, then they need to write a contract not to revoke a Will, or each write trusts giving on-going support to surviving spouse and then giving remainder to his/her children or all the children. Should the trusts be revocable or irrevocable? Irrevocable trusts may not be flexible enough. Revocable trusts are subject to revocation.**

**ii. Both parties really need Wills and discuss use of lifetime trusts.**

**iii. Should both parties use the same attorney?**

**iv. The couple should discuss exempt property. First \$25,000 of personal property and the decedent’s car (up to value of \$25,000) and other property automatically vests in surviving spouse. Picture all the keepsakes from husband’s first marriage automatically passing to second spouse instead of first children. Plan for this. Maybe a waiver of some estate rights.**

**c. Planning for step-children, half siblings.**

**d. Need to execute powers of attorney and health care documents.**

**i. Consider issues of who will be the agent – especially if giving the agent a gifting power. Agent, who is child of husband, might be tempted to gift all of husband’s money to children of husband’s first marriage thereby reducing/eliminating resources available to second spouse. Perhaps require one agent from husband’s side and one from wife’s side and require them to act together? Potential for stalemate.**

**ii. Who will be hcp agent? Second spouse rather than first child? There will be emotional and practical baggage.**

- D. Income tax planning.
  - a. Deductibility of “alimony” payments and inclusion of alimony income is about to change.
  - b. All the other income tax issues surrounding any married couple. Refer to Doug’s outline.
    - i. Filing status.
    - ii. Asset titling for tax purposes.
    - iii. Claiming children for deductions

**Family profile #5: Adult Child with Special Needs.**

- A. Using trusts to protect and manage the child’s assets.
  - a. Lifetime trust vs. testamentary trust (prefer lifetime).
  - b. SNT vs. discretionary trust.
  - c. Who will be the trustee, alternate trustee?
  - d. Distribution issues.
    - i. What kind of benefits is the beneficiary receiving?
    - ii. How competent is the beneficiary to manage even a small amount of income?
- B. Guardianship proceedings for adult children.
- C. Aging out and being unable to physically care for an adult child with special needs.
- D. ABLÉ accounts.
- E. Tax planning on taxable income and distributions from the trust.
  - a. Taxes on trust income vs. individual tax rates.
  - b. >12,700 = Max Rates

*We hope this outline has been helpful. Please feel free to reach out to any of the panelists for follow up information.*

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