FEATURE:
ESTATE PLANNING & TAXATION

By **Sandra D. Glazier** & **Martin M. Shenkman**

Considerations for Representation In Blended Family and Second Marriage Scenarios

Assessing an attorney's ethical duties

Attempting to address all the planning concerns of married couples can be difficult, but there are added complexities, considerations and risks when the parties have been previously married or have children from another relationship. Understanding issues that can arise may be of particular import when assessing one's ethical duties in the context of estate planning and representation of a surviving spouse in the administrative phase. This isn't a theoretical issue when blended family units are now viewed as the norm.[1] The majority of family units have been classified as "blended," and 65% of remarriages involve children from a prior marriage on at least one side, creating a blended family.[2]

Changing Family Structures

The nature of the family unit has changed dramatically over the years. For example:

> Non-marital births continued to rise until the mid-2000s, when the share of births to unmarried women stabilized at around 40%. Not all babies born outside of a marriage are necessarily living with just one parent, however. The majority of these births now occur to women who are living with a romantic partner, according to analyses of the National Survey of Family Growth. In fact, over the past 20 years, virtually all of the growth in births outside of marriage has been driven by increases in births to cohabiting women.[3]

Practitioners need to be alert to the relationships of the individuals seeking counsel. The likelihood that clients are single parents, cohabiting parents or same-sex couples has all grown dramatically. While we'll explore some of the issues of representation of second and later spouses, the reality is that in many instances, estate plans may need to consider bequests for children born out of wedlock and significant others who may not enjoy all the benefits of marriage. We don't address the considerations of non-married couples and other relationships.

Conflicts Between Spouses

While conflicts between parties to a first marriage can and do arise, the potential for conflicting interests tends to increase in planning and administering estates in a second or subsequent marriage and in blended family scenarios. Before being engaged to represent both parties, it's important to assess whether their interests are sufficiently aligned to permit joint representation. When evaluating joint representation, consider that 60% of marriages that are at least a second marriage for one partner ends up in divorce.[4] The statistics are worse for third or later marriages, reflecting that "more than 60 percent and up to 73 percent of all marriages involving children from a previous relationship ultimately fail."[5]

Waiver

While some conflicts may be waived, others may not. With some conflicts, the issue may be so serious that even the provision of a waiver, with informed consent,[6] may not be sufficient.[7] The

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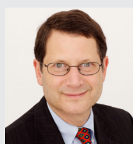

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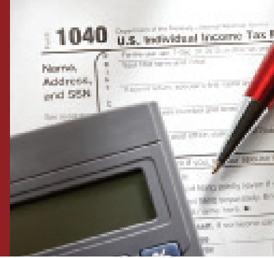


need for informed consent contemplates that the lawyer communicate adequate information and an explanation about the material risks of, and reasonably available alternatives, to a proposed course of conduct.[8]

Joint Representation

If there's potentially a 73% likelihood of the union failing, some may question the advisability of jointly representing a couple.

What if the plan contemplates a marital property agreement or the retitling, gifting or transferring of assets for estate-planning purposes that could adversely impact rights of one of the parties in the event of divorce? In those circumstances, a serious conflict may exist, and separate counsel for each of the parties may be required.

When a conflict (or potential conflict) exists between spouses, the lawyer may not be able to represent both parties, especially if one wants the lawyer to persuade or advocate for the other spouse to engage in a particular course of conduct.[9]

The American College of Trust and Estate Counsel commentaries caution against a lawyer attempting to represent both spouses through the use of separate engagements.[10] Doing so is generally viewed as being inconsistent with the duty of loyalty owed to each client. Consequently, the lawyer should represent both under a single engagement or only represent one of them.

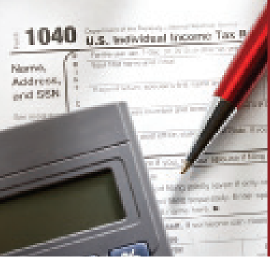
While it's certainly possible (and in some instances cost effective and appropriate) for joint representation to occur in a blended family or second marriage scenario, it may nonetheless be prudent to first communicate with one of the proposed clients in an attempt to ascertain if the parties' interests are sufficiently aligned and attempt to identify actual and potential conflicts before communicating with both. By communicating first with only one of the parties, the lawyer may be able to avoid the possibility that a consultation with both precludes representation of either.[11] When the lawyer speaks with one spouse who indicates they want joint representation, and the lawyer hasn't identified an impediment (for example, a conflict that can't be waived), a communication to both is recommended to: (1) address that information provided by one will be shared with the other, and (2) identify and explain potential implications of a joint versus individual engagement, areas of potential conflict and what will happen in the event of a future conflict. The preferable way to address this disclosure, and the clients' acceptance of such risks, is probably in writing. Some states require waivers of conflict to be in writing, while others don't.

Joint vs. Separate Representation

There are a host of factors to evaluate when determining whether to represent a blended couple jointly or instead only represent one of them. From a defensive practice perspective, one of the threshold issues practitioners might want to consider is the possibility of a heighted malpractice risk when representing blended families.[12]

> Practitioners should carefully evaluate whether the clients are likely to achieve any actual benefits from joint representation before pursuing it.

The possible benefits of joint representation are economies of cost savings, an integrated plan and better communication. But these purported benefits aren't always significant. If the documentation for each spouse will be quite different, precluding the "flip" of one document to create a document for the second spouse (or the automatic generation of both documents using document generation software), the purported cost savings to the client may not exist. If the dispositive scheme of each spouse is quite different so that distinct documents will have to be created, there may be little or no incremental cost for each spouse using separate counsel. The purported benefits of an integrated plan may also depend on the size of the estate and the exemption amounts. Even when the current exemptions are reduced by half in 2026, many blended family couples won't face an estate tax. Thus, practitioners should carefully



evaluate whether the clients are likely to achieve any actual benefits from joint representation before pursuing it.

The possible benefits of separate representation should also be considered. For the clients, there will be freedom to speak as each wishes, without constraint about what the other spouse (who won't be present in separate representation) feels. Each spouse will receive undivided loyalty and a candid explanation of potential consequences. For counsel, there may be a lesser chance of conflict or litigation in the future.

Some of the circumstances that might suggest that separate representation may be preferable include:[13]

- whether counsel has a past relationship with either of the spouses;
- if one spouse is childless (partners usually have different loyalties), but the other isn't;

> Whether joint or separate representation occurs, special consideration as to how children are defined and are to be treated may be appropriate.

- if one spouse controls the discussions at the meeting with counsel or appears 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 (whether or not used against them);
- existence of prenuptial or postnuptial agreement.
- existence of separate or anticipated gifts or inheritance;
- existence of a closely held generational business; and
- if information held by one spouse is kept secret from the other spouse.

Practice Considerations

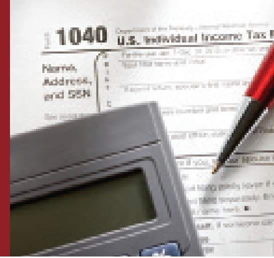
Even when joint representation is possible, it remains important to advise both parties of the potential impact and risks of joint representation before obtaining information from them. Providing a writing that sets forth considerations and potential risks of joint representation may help the parties assess whether they truly wish to enter into a joint engagement. We recommend having the clients sign an instrument that addresses current and prospective conflicts and identifies what will occur if a conflict that can't be waived arises.

Children in the Blended Family

Parties may or may not initially be aligned in how they wish to define and treat all of the children. Moreover, the discussion of how a spouse might influence the disposition following the death or disability of one might create considerable angst between the parties. The level of concern may increase multi-fold if the parties don't want to treat children that are issue of the marriage the same as those born of a different relationship or wish to treat children better than a surviving spouse. Even the selection of a successor fiduciary can raise concerns in a blended family situation. How discretionary powers might be exercised when the glue that holds the family together is weakened, incapacitated or gone may be a hot button topic.

Whether joint or separate representation occurs, special consideration as to how children are defined and are to be treated may be appropriate. In the recent Michigan case of *In re Joseph & Sally Grablick Trust,*[14] the court was tasked with determining whether divorce terminated a relationship by "affinity," thus causing "a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse" to be revoked. The appellate court determined that divorce indeed severed the affinity relationship, thereby essentially voiding the bequest to the grantor's former spouse's child, even though she remained someone with whom the grantor purportedly maintained a close relationship following the parties divorce.[15]

When children of a prior relationship are appointed fiduciaries with discretionary powers



(whether under a durable power of attorney, will or trust), the opportunity for conflict may be enhanced.

Trust Planning

The use of trusts qualifying for qualified terminable interest property treatment is popular in first and subsequent marriage scenarios. But what if the grantor wants to limit the surviving spouse's interest to an income only interest or terminate discretionary invasion powers if the surviving spouse remarries? Might such desires create a conflict requiring the termination of a joint engagement? While the lawyer can attempt to help joint clients bridge differences, they can't advocate for one against the other nor should the lawyer create documents on behalf of one client that adversely impacts the other without first obtaining that client's expressed and informed consent.

Even how the term "spouse" is defined or construed can take on a level of importance worthy of enhanced consideration when it might apply to more than one individual. Consider the potential implications of a "floating spouse" provision contained within a spousal lifetime access trust (SLAT) or one client's desire to have the other consent to the creation and funding of a domestic asset protection trust in a jurisdiction that doesn't have exception creditor protection for that spouse or children. Even the creation of an irrevocable trust for the benefit of a child and their spouse and children, which doesn't clearly define the "spouse," can wreak havoc following divorce and remarriage.[16]

Also, in formulating any estate tax plan, asset titles may have to be restructured. That can have profound implications to a prenuptial agreement and spousal rights. The retitling of assets may adversely affect a spouse's spousal right of election or destroy separate or community property rights. That could put counsel representing the spouses jointly in a difficult position. Changing title from joint or tenants by the entirety to one spouse to facilitate future gifting to use exemption may undermine the rights the other spouse may have had in those assets. The rights that might be received under a SLAT or other trust arrangement may not be nearly as robust as those that were previously held under a joint title arrangement.

Representation of Fiduciary

Assessing the existence or potential for conflict doesn't end with the drafting engagement. Even if you represented only one party during the estate-planning phase, but the other becomes a fiduciary under the instruments drafted, a conflict of interest can arise. It may be foreseeable that during a period of incapacity, the spouse who wasn't the client seeks the estate-planning attorney's guidance and representation. Could such representation result in a later conflict that precludes ongoing representation in the event the original client regains capacity? Suppose the surviving spouse has a claim against the estate or wants to exercise statutory rights, or powers of appointment, in a fashion that will undercut the grantor's plan? Perhaps representation should be limited to only representing the surviving spouse in their fiduciary capacity. It can be helpful to address, during the initial engagement, whether representation of the spouse is desired and what will happen in the event of a conflict.

> Even the purchase of prepaid funeral arrangements and a plot in advance of death may not supersede a surviving spouse's right to make funeral decisions.

Medical Decision Making

Not all considerations are of ethical import. Consider who will make medical decisions. Imagine the conflict when a surviving spouse wants to pull the plug, and children from a prior marriage are totally opposed. Think about funeral arrangements. While a surviving spouse might have statutory priority to make arrangements, what if that isn't what a client wants? Perhaps the client wants to be buried next to a prior spouse, but the surviving spouse has another idea. If the spouses are of different religious affiliations or backgrounds, these decisions could be more nettlesome. A carefully drafted designation of

funeral representative might help to avoid conflicts, but it might not be recognized in the jurisdiction where the grantor is located at the time of death. Even the purchase of prepaid funeral arrangements and a plot in advance of death may not supersede a surviving spouse's right to make funeral decisions. What if the surviving spouse or funeral representative goes off the rails and makes extravagant funeral arrangements, and the personal representative or trustee deems the expense to be unreasonable? Perhaps providing a written declaration of desires with regard to such arrangements might help to avoid those conflicts, which seem to occur with greater regularity in blended family situations.

Attorney as Fiduciary

Suppose the clients feel appointing the lawyer as fiduciary will help avoid conflict. Additional ethical considerations, beyond the scope of this article, will then need to be addressed.[17]

Endnotes

1. *https://helpingblendedfamilies.com/blended-family-statistics/.*
2. *https://brandongaille.com/20-noteworthy-statistics-of-blended-families/.*
3. "The American Family Today," Pew Research, *www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/,* (Dec. 17, 2015).
4. *Ibid.*
5. *www.stepmommag.com/stepfamily-statistics/.*
6. *See* American College of Trust and Estate Counsel (ACTEC) Commentaries on Model Rules of Professional Conduct (MRPC) 1.0(e) (Terminology) (defining "informed consent") and MRPC 1.0(b) (Terminology) (defining "confirmed in writing"). The writing may be contained in an engagement letter that covers other subjects as well.
7. MRPC 1.7, ACTEC Commentaries, 5th Ed., "Conflicts of Interest May Preclude Multiple Representation," at p. 104.
8. *See* MRPC 1.7, ACTEC Commentaries, "Prospective Waivers," at p. 105.
9. Sandra D. Glazier and Martin M. Shenkman, "Joint/Dual Representation—Add protections to your retainer agreements to reflect challenges involved," *www.wealthmanagement.com/estate-planning/jointdual-representation,* (July 20, 2017).
10. MRPC 1.7, ACTEC Commentaries, "Joint or Separate Representation," at pp. 102-103, citing generally *Price on Contemporary Estate Planning*, Section 1.6.6, at p. 1059 (2014).
11. *See* MRPC 1.18 and MRPC 1.7, ACTEC Commentaries, "Disclosures to Multiple Clients," at p. 102.
12. Sandra D. Glazier, Martin Shenkman, Jonathan G. Blattmachr and Joseph Garin, *"Wellin v. Nixon, Peabody, LLP*—Case Lessons on Defensive Practice," *LISI Estate Planning Newsletter* #2934 (Jan. 20, 2022).
13. Thanks to author and advisor L. Paul Hood Jr. from whom this listing was adapted.
14. *Banaszak v. Grablick (In re Joseph & Sally Grablick Tr.),* Nos. 163981, 163982, *Banaszak v. Grablick (In re Tr. of Grablick),* Nos. 353951, 353955, 2021 Mich. App. LEXIS 7032 (Ct. App. Dec. 16, 2021); leave for application to appeal pending 2022 Mich. LEXIS 1098 (June 2, 2022).
15. *See* Sandra D. Glazier, "*In re Joseph & Sally Grablick Trust:* An Ounce of Prevention is Worth a Pound of Cure," *LISI Estate Planning Newsletter* #2931 (Jan. 10, 2022).
16. *See* Sandra D. Glazier, "*Ochse v. Ochse:* A Spouse is a Spouse of Course of Course, Unless Perhaps One is a Spouse Following a Divorce of Course, of Course," *LISI Estate Planning Newsletter* #2856 (Jan. 25, 2021).
17. *See* MRPC 1.7, ACTEC Commentaries, at pp.105-107.