

ESTATE PLANNING FOR THE BLENDED FAMILY: SYNERGY OR DISHARMONIC CONVERGENCE?

Presented by:

AMANDA M. GYESZLY

FIZER, BECK, WEBSTER, BENTLEY & SCROGGINS, P.C.

1330 Post Oak Boulevard, Suite 2900

Houston, Texas 77056

Fax: 713-963-8469

Telephone: 713-840-7710

Email: agyeszly@fizerbeck.com

Written by:

KRISTI N. ELSOM & AMANDA M. GYESZLY

FIZER, BECK, WEBSTER, BENTLEY & SCROGGINS, P.C.

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Exhibit A – Spectrum of Estate Planning Options for the Blended Family

Exhibit B – Planning for the Blended Family

Exhibit C – Engagement Letter

Exhibit D – Special and General Powers of Appointment Limited to One Creditor

Exhibit E – Marital Unitrust – from Stephen T. Dyer

Exhibit F – Referring to Divorce Obligations – from Stephen T. Dyer

Bibliography

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Estate Planning for the Blended Family: Synergy or Disharmonic Convergence?

Estate planning is a delicate balance of the personal wishes of the client and the laws of the state of domicile and the Federal government. However, the balancing act is elevated to a whole new level when the natural objects of the client's bounty are comprised of a second (or fifth) spouse, and the children from the client's current and prior marriage(s), as well as those children from the spouse's previous marriage(s). This educational presentation discusses the approach an estate planning attorney might employ when working with a blended family and the spectrum of planning techniques that may be utilized. As with all such presentations, this cannot be taken as legal advice or replace individual research on a particular subject, and for the benefit of the IRS, is not a covered opinion subject to Circular 230.

I. AMBITIOUS ASSIGNMENT

One of the most challenging estate planning opportunities is working with clients who do not represent the nuclear family – the married couple with children only from their marriage – a so called "traditional family". Examples of non-nuclear families are couples with children from prior marriages and couples with no children but with collateral relatives (nieces and nephews) or elderly parents for whom a spouse wants to provide. For simplicity, the discussion will center around planning for the couple with children from prior relationships. The blended family clients have the same complicated tax issues as traditional families. However, traditional tax planning may not adequately address the intricate interrelationship issues present in many blended family situations. In such cases, the estate planning advisor has the ambitious assignment of educating the client(s) on the various issues, and proposing options to reduce the potential for friction between the surviving spouse and step-children while minimizing transfer taxes, all for a reasonable fee.

A. How to Approach Such Clients.

First, carefully consider the situation. Paula J. Egner described it aptly when she said: "You're sure that the phrase 'Blended Family' was coined to conjure up a smooth and painless uniting of two families. But your experience feels more like frogs being dumped into the same blender in the hopes of extracting the prince of all step families."

1. Psychologically. Expect the topic of estate planning to be a very sensitive subject for the clients. The emotional and psychological trauma that caused the severance of the original family (or families), usually a death or a divorce, and the fusion of two families can have a significant and a continuing impact on your clients and their children. Accordingly, anticipate the blended family clients to have more life experiences (and unfortunately, some unpleasant ones) that will affect, and often impede, their decision making process in the estate planning arena. It is not atypical for one of the spouses to initially feel the intent of estate planning is to divide the assets and take away the financial security he or she desires. Lay the proper foundation for the clients by telling them that many couples struggle with the issues raised by having separate families. The estate planning advisor may have to serve as a mediator in these situations. As the advisor explains the options and considerations, he or she must be careful to avoid creating adversarial situations.

2. Defining Clients' Goals and Priorities. The main focus of the initial discussions is to clarify the clients' goals and priorities. These may include:

- a. Caring for spouse and any children of the present marriage;
- b. Providing for former spouse and/or children from a prior marriage;
- c. Simplicity; and
- d. Tax savings.

If either of the spouses has been divorced, the planner should inquire about any contractual obligations under an agreement incident to a divorce decree, and confirm that the former spouse is no longer a beneficiary of the client's estate (unless otherwise required by agreement). In most circumstances, if disposition documents were executed prior to divorce, a divorced spouse will not be a beneficiary of the former spouse's estate or an agent or fiduciary of the former spouse. See Tex. Prob. Code § 69 (for Will), Tex. Prob. Code §§ 471-473 (for management trust), Tex. Prob. Code § 485A (for power of attorney), Tex. Fam. Code § 9.301 (for insurance) and § 9.302 (for retirement plan), and Tex. Health & Safety Code § 166.155 (a)(3) (for medical power of attorney).

3. Explaining Options. It is helpful to set forth the various options in a simple graph ranging from one extreme (all to spouse) to the other extreme (all to children). An example is attached at the back of the outline. This can serve as a template to which you can refer as the clients narrow their focus and specific techniques are selected.

4. Homework Approach. Unlike more routine planning situations, one interview is rarely sufficient for the clients to make final decisions (so plan your work and fees accordingly). In the first meeting the advisor typically discusses alternatives and requests the clients to take a few days to consider the options before directing the advisor to start drafting/implementing the plan. Educate your clients on the process so their expectations of time and effort on their part are realistic. Further meetings may be necessary to discuss the various techniques, and to clarify the results the clients are seeking, as well explain the advantages and disadvantages of the final plan. Have clients complete a questionnaire to advise you of their assets and indicate their choices for fiduciary positions.

B. Ethical Issues.

Unless each spouse had an advisor before the marriage, it is not unusual for a couple to jointly seek estate planning assistance. The first item

the professional must assess is whether there is a conflict of interest between the two spouses, and if there is, determine if the conflict is an impediment to joint representation by the professional.

An attorney shall not represent a client if the representation of that client will be directly adverse to another client unless the attorney reasonably believes one representation will not adversely affect the other, and both clients consent after consultation, that is confirmed in writing. When representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the common representation and the advantages and risks involved. Rules 1.06 and 1.07 of the Texas Disciplinary Rules of Professional Conduct. Other professionals are covered by similar restrictions that are imposed by the licensing group or as a creed of an association.

These particular rules are currently being reviewed by the Supreme Court and may be changed substantially.

Clearly, there is the potential for a conflict of interest in dealing with the various needs and wishes of blended families. In fact, in such situations the estate planning advisor is obligated to educate the husband and wife regarding these conflicts and/or potential conflicts. In some cases the conflict is such that the professional must withdraw from or decline the joint representation.

Assuming there is no ethical violation, in some instances the clients may be better served when represented by the same estate planning professionals who have an overall understanding of the family's entire situation and who can coordinate the various components of the estate plan. In such cases, if the attorney proceeds with a joint representation of the husband and wife, the attorney should clearly disclose the potential conflicts at the outset, advise the clients of the ramifications of the conflicts, and remain vigilant should the need to withdraw arise. See ACTEC Commentaries on the Model Rules of Professional Conduct (Fourth Edition, March 2006). Attached is an example of an engagement letter used in the author's practice. For examples

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