

Fathers, Mothers, Sisters, Brothers and Others: Shower the People You Love With "Tangential" Planning

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Rhonda Brink specializes in estate and trust law and her practice addresses all aspects of family wealth management and disposition. Before starting with Brink Bennett Flaherty in April of 2015, Rhonda had been the supervising shareholder of the wealth-transfer section of a major Austin law firm and later opened her own practice in 1998. She was admitted to the Texas Bar in 1974 after receiving a Bachelor of Science degree in economics from Trinity University in 1971 and a J.D. from the University of Texas School of Law in 1974.

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Rhonda has been listed in the Best Lawyers of America since 1995 and has been recognized by Texas Monthly as a "Super Lawyer" in her field of expertise since 2002. She has been selected for membership in the inaugural and recurring editions of the Martindale-Hubbell Bar Registry of Preeminent Women Lawyers. She was selected as one of 2015's Women Leaders in the Law, as published in the March 2016, Best Lawyers, first-ever Women in the Law Edition. She serves on the Austin Gift Planning Advisory Council of the University of Texas at Austin. Rhonda was one of four Texas attorneys selected to receive the Standing Ovation Award for 2008 – a recognition of CLE volunteers by the Texas Bar CLE staff.

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- "Marital Property Agreements and Cohabitations Agreements: An Estate Planner's Perspective," *Texas Bar Estate Planning and Probate Drafting Course*, Houston, Texas October, 2013 (speech and publication)
- "Putting It All Together: Strategies for Intermediate Planning," *Texas Bar 2nd Annual Intermediate Estate Planning and Probate Course*, Houston, Texas, June, 2013 (speech)
- Course Director, *Texas Bar 1st Annual Intermediate Estate Planning and Probate Course*, San Antonio, Texas, June, 2012
- "Charitable Planning for Clients Who Aren't Wealthy," *Texas Bar Advanced Estate Planning & Probate Course*, San Antonio, Texas, June 2012 (speech)
- "Estate Planning & Probate 101," *Texas Bar Advanced Estate Planning & Probate Course*, Fort Worth, Texas, June 2011 (speech)
- "Smart Planning for Smart Women: Protecting Yourself, Your Family, Your Assets," *Continuing & Innovative Education, The University of Texas at Austin*, Austin, Texas, September, 2010 (speech)
- "Ancillary Documents: Beyond the Statutory Forms," *Texas Bar Estate Planning and Probate Drafting Course*, Dallas, Texas October, 2009 (speech and publication)
- "What Was I Thinking? Estate, Probate and Practice Management: Tips and the Top 10 Things to Avoid," *32nd Annual Advanced Estate Planning & Probate Course*, Dallas, Texas, June 2008 (speech and publication)
- "Life in a One or Two-Lawyer Firm: Small Town and Big City Perspectives"—*The University of Texas School of Law and the Texas State Bar Association Present: How to Establish, Organize and Operate a Successful Solo, Small Firm, or Government Practice*, Austin, Texas, February 2008 (speech)

Brooke Hardie (cont.)

Community Involvement & Professional Memberships and Activities

- Secretary, Estate Planning & Probate Section of the Austin Bar Association, 2016 to Present; Board Member, 2015 to Present
- Seton Planned Giving Advisory Council, 2014 to Present
- Adjunct Professor, Texas State University, Fall 2014
- Greenlights for Non-Profit Success – Community Leadership Council, 2010 to 2012
- Atticus Circle – Board Member, 2010 to 2012
- Greenlights for Non-Profit Success – Board of Directors, 2004 to 2008
- Austin Women Entrepreneurs, Inc. ("AWE") – Founding Member and Board of Directors, 2008 to 2010
- Elizabeth Ann Seton Board – Board of Directors, 2009 to 2010
- State Bar of Texas and Austin Bar Association
- Licensed to practice law in the State of Texas and the US District Courts for the Eastern, Western, Northern and Southern Districts

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FATHERS, MOTHERS, SISTERS, BROTHERS AND OTHERS: SHOWER THE PEOPLE YOU LOVE WITH "TANGENTIAL" PLANNING

In the committed couple context, it has been said, "Don't leave the one you love with nothing but memories." To shower more than love on persons in both direct and tangential relationships incorporates new tools and new applications of standard tools – all applied to divergent relationships that may include, but go far beyond committed couples and spouses of any gender. Property issues or claims may arise out of tangential relationships as diverse as children born as the result of nontraditional reproductive technology to employer-employee matters. In a nut shell, this concentrates on negating some relationships, establishing others and providing for those that exist in law or in fact. In the lyrics of James Taylor's immortal song *Shower the People*, he advises that, "It doesn't take any sacrifice ... Things are gonna work out fine if you only will do as I say ... Things are gonna be much better if you only will." Today we hope to say enough that you will have some specific action items to help you plan for that tangential relationship that has walked thorough your office door – or is soon to find its way in.

I. INTRODUCTION

A. Disclaimer

The state of the law on certain matters which are the subject of this presentation are in flux, and the effect and consequences from entering into any agreements or use of any forms or documents attached to these materials must be considered only with individual research and based on the individual facts and circumstances of any given representation. Neither the authors nor the speaker opine on the validity of or make any guarantee of suitability or enforceability of any form, document or agreement that is attached to this article or discussed in this presentation. Ms. Hardie's materials on assisted reproduction and gestational agreements have not been updated since the article was first published in 2016, but are included to highlight that determining the status of a relationship can be a fact specific matter. The citations from Associate Judge Ruth Stiles' and Eric Bean's articles have not been confirmed. For the sake of space, most such attachments omit signature pages, most related schedules or exhibits such as property schedules, waivers of disclosure, ratifications, attorneys certifications, and attestations for contractual Wills. These forms cannot be considered "pirate-able" without customization.

B. Scope

Yes, it really happens. Some of the tangential relationships that are explored here have been actual cases presented to the authors. We first intended to update "couple" planning in a post-*Obergefell*¹ environment, but suddenly realized that same-gender spouses have the same planning needs as opposite-gender spouses – with limited exceptions; and that the planning needs of committed unmarried couples are not all that different from those rising out of other non-spousal relationships.

The statistical reality of the decline of marriage suggests that continued attention to the estate planning needs of committed couples is needed. However, because that has been addressed before, we expanded to consider new relationships – some not formerly studied, and some that have no ready definition. These "tangential relationships" require planning, particularly because there may be no statutory defaults or ready alternatives. Some relationships demand acknowledgment and some may need to be negated, but all may have to be addressed in some definite way – if nothing more than to fill gaps created by change in status or to accomplish certainty in what might otherwise be an emergency situation with no plan.

C. Terms and Limitations

A common relationship is persons of the same or opposite-gender living as emotional and economic partners without being married. In the past, Rhonda chose to call two persons living together in a close emotional and economic relationship, who are not married, simply, "committed couples."

Pre-*Obergefell*, Rhonda discussed two categories of "married" couples of the same-gender: those who are married and whose relationship is legally recognized, called "recognized spouses", distinguished from "non-recognized spouses" – those living in states whose law prohibited or did not recognize same-gender marriage. The

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

later class of non-recognized spouses is history. Same-gender spouses are just that – recognized spouses. Some of their remaining unique planning needs are noted here.

In addition this article describes as one tangential relationship that of “children” conceived by artificial reproduction (“AR”). This is a pattern seen with increased frequency in our practices. We do not intend to address how to draft AR agreements, but include one – especially for those who have not encountered same in their practices.

Time and space limitations prohibit a thorough analysis of all issues in all classes of tangential relationships. The authors’ goals are to highlight relationships that lead to estate planning problems and suggest solutions – in an effort to focus attention on special issues and special relationships. We offer a bibliography for those seeking additional research and understanding. Moreover, we hope to awaken a sense of the “new normal” – to encourage estate planners to be open to what they may not have worked on the past and to know what type of questions may need to be asked in the modern world of tangential relationships.

D. It Can Happen to You

As the authors prepared for this they began sharing stories - they anonymously disclosed to each other tangential client situations with which they had been presented or with respect to which they had offered planning opportunities. Property agreements for same-gender couples that transcended both *Windsor*² and *Obergefell* were discussed. Advice to same gender couples trying to have children through the use of donated sperm was considered. The most novel of tangential relationships were revealed – like a recent example of a family unit consisting of an opposite-gender committed couple living with the wife's former husband (who she divorced because he is gay) and a minor child, the biological child of the former husband. This is well beyond the Brady Bunch. But the relationship unit is not just family or couples – it may include other non-related persons ranging from employer-employee relationships to joint owners of all nature whose interests may deserve both attention and protection.

E. Demographics Prove the Point.

The breadth of changing relationships which are the subject of this presentation were exemplified the 2018 Trachtman Memorial Lecture given by R. Hugh Magill, Executive Vice President and Chief Fiduciary Officer of Northern Trust Corporation, at the Spring ACTEC meeting in San Antonio Texas. His presentation was entitled *It's All In The Family . . . What is a family? Estate Planning And Trust Management For A Brave New World*. The demographic statistics highlight the differences between generations with whom estate planners deal. They range from the *traditionalists*, who are referred to generally as the “G.I. generation” and as the “silent generation.” Contrast this to the “Boomers” (identified as *idealistic*), “Generation X” (identified as *reactive*) and “Millennials” (identified as the *civic* generation). The types of households are staggering – married households are decreasing as nonfamily households and other family households increase. There is a huge increase in unmarried couples of the opposite sex. Author Magill describes a changing marital paradigm by comparing two models. The **old model** moved from courtship, to marriage and cohabitation, to children, and to financial security. The **new model** moves from courtship, to cohabitation, to financial security, to children, then to marriage. The variety of living arrangements with which estate planners deal is broad – including unmarried, committed couples, to unrelated co-parenting arrangements, to arrangements to create children artificially. Statistics gathered from the United States Census Bureau report “America’s families and Living Arrangements” (2013) identified 35% of American Families as traditional (heterosexual married with children), 31% as households without children, and 34% as modern (blended multi- generational, same-sex, single-parent, and others). What is obvious is that these demographics raise questions of how and to whom wealth will be allocated, how clients design for personal-care issues, and how planners consult about relationships and objectives in order to draft plans flexible enough to survive in these changing times.

F. When You Least Expect It – Or Need to Plan For It.

A premise of this article is that novel relationships must be honored as necessary, or negated when unintended. It is not possible to discuss tangential relationships with out noting that some relationships may “come out of the woodwork.”³ One can have a spouse or children without necessarily intending to do so. Texas is one of the relatively

² *United States v. Windsor*, 133 S.Ct. 2675 (2013).

³ *Out Of The Woodwork: An Update On The Law Regarding Common Law Marriage, Putative Spouses And Adoption By Estoppel*, by Associate Judge Ruth Ann Stiles, Houston Bar Association May 2003

Also available as part of the eCourse

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