

PRESENTED AT

The University of Texas School of Law
22nd Annual Estate Planning, Guardianship, and Elder Law Conference

July 30-31, 2020
Live Webcast

Estate Planning for Blended Families

John R. McNair

Author Contact Information:

John R. McNair
McNair Dallas Law
Dallas, Texas

jmcnair@mcnair-dallaslaw.com
469-200-8371

Estate Planning for Blended Families

Table of Contents

ETHICAL ISSUES	1
Joint Representation	2
CONFLICT OF INTEREST	2
WAIVER OF CONFLICTS	2
CONSIDER FRAUD ON THE COMMUNITY CLAIMS	3
CONFIDENTIALITY ISSUES	3
THIRD PARTIES – THE ADULT CHILDREN?	4
Representing One Spouse Only	5
ADVANTAGES	5
DISADVANTAGES	5
UNDERSTAND THE SITUATION	5
Inventory of Assets	5
Clients’ Understanding of the Separate/Community Character of Assets	7
Is There a Prenuptial Agreement?	8
Does the Prenuptial Agreement Address Death –Time Transfers?	8
Does the Prenuptial Require Certain Life Insurance Policies?	8
Spousal Obligation Pursuant to a Prior Divorce Decree	9
Family Dynamics	9
Closely Held Business Assets	9
Length of Marriage	10
Relationships With and Between Children	11
Consider How You Define Children	12
SPECIFIC PLANNING ISSUES	12
Homestead	12
FAMILY ALLOWANCE	13
JTWROS AND POD DESIGNATIONS TO ACCOUNTS	13
Community Property Issues & Commingling	14
PRESUMPTION OF COMMUNITY	15
INCOME GENERATED BY SEPARATE PROPERTY	16
TRACING	16
TRANSFERS IN FRAUD OF COMMUNITY	17
USING A POSTNUPTIAL AGREEMENT TO CLEAN UP ISSUES	18
PLANNING STRATEGIES	19
Different Assets to Different Beneficiaries	19
Death of Spouse – Some to the Children Now – Some Later	20
Use Life Insurance	21
Life Insurance and Spousal Lifetime Access Trusts	22
AVOID JOINT TRUSTS IF YOU CAN	24
Dangers of Joint Trusts – Spouse and Step-Children	24
Power of Appointment as a Remedy to the Problem?	26

If You Simply Can't Avoid the Joint Trust – Consider Independent Trustee	26
Estate Tax Portability and the Blended Family	27
If You Simply Can't Avoid the Joint Trust – Consider a Private Unitrust	28
The Private Unitrust and QTIP Trusts	31
ELDER LAW ISSUES AND THE BLENDED FAMILY	32
Liability for Long Term Costs Between Spouses	32
Nursing Home Medicaid and Spousal Impoverishment Rules	33
Typical Planning – CP Partition Agreement – Follow Up Gift	35
Consider the Wisdom of this Strategy with a Blended Family	36
Home in the Hands of the Community Spouse – Consider Blended Family Issues	37
DISABILITY PLANNING WITH BLENDED FAMILIES	38
Choice of Agent Under Power of Attorney	38
Accounting by the Agent	39
Consider Appointing a Monitor Under the POA	40
Exhibit A	41
Exhibit B	42
Exhibit C	51
Exhibit D	52
Exhibit E	53

Estate Planning for Blended Families

“All happy families are alike; each unhappy family is unhappy in its own way.”

Leo Tolstoy – opening line of Anna Karenina.

One of the ways estate planning continues to be fascinating, no matter how long you practice law, is that you never know who'll show up as a client. Will it be the standard nuclear family with two parents and children from that marriage, or, as is often the case, will it be a second marriage with his kids, her kids and maybe even their kids. And you, as the planner, have no way of knowing the underlying dynamics of that family. Are they the Brady Bunch? Everyone gets along and there are no hidden agendas. Or, are they the Kardashians, with enough dysfunction to keep you up at night wondering if you can ever get this done to everyone's satisfaction?

This paper will be a survey of the issues associated with estate planning for a blended family and various planning techniques for that purpose. The underlying assumption is a second marriage with adult children from prior marriages for one or both spouses. The goal, in any such an engagement, is to try and reduce the chances for discord and litigation. This goal is often difficult because the spouses are not always entirely clear about their own goals. Undoubtedly, there is a desire to provide for the spouse, but also the children. They want to find a way to do that without tension and possible disputes. But that isn't always easy. That is what we need to consider.

ETHICAL ISSUES

One of the first steps in taking on a blended family is to determine who you represent. If only one of the spouses contacts you, that's easy enough. If that one spouse makes clear that they want you to do the estate planning for them alone, there are no issues. But what if both spouses approach you? Can you represent both of them, given the complexities of the blended family? Don't they have potential conflicts

of interest? Aren't there disclosure issues? Can these problems be waived by the couple to allow for joint-representation? As the planner, your first task is to resolve these issues.

Joint Representation

CONFLICTS OF INTEREST

Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct provides that "a lawyer shall not represent a person if the representation of that person involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm." In addition, "a lawyer shall not represent a person if the representation of that person reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client"

Is it possible the couple have conflicting interests because of conflicting goals? Yes, they want to provide for each other. But they may also want to provide specifically for their own children. The provisions for those children may be in direct conflict with the provisions for the other spouse or the children of the other spouse. It is clear that in many of these blended family cases there is a potential for conflicting interests.

WAIVER OF CONFLICTS

Rule 1.06(c) goes on to provide a possible solution for the attorney. It states that "a lawyer may represent a client in the circumstances described in "b) if the lawyer reasonably believes the representation of each client will not be materially affected" and "each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Estate Planning For Blended Families

Also available as part of the eCourse

[2020 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the
22nd Annual Estate Planning, Guardianship and Elder Law Conference session
"Estate Planning For Blended Families"