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Adapt Old Strategies to Fit New Family Arrangements

While estate planning continues to focus on providing for loved ones, modern families do not necessarily match the profile of past generations.

The 21st century family comes in a wide variety of configurations. Marriage, remarriage, no marriage, polyamory, and single parents by choice are just some of the characteristics of today’s families.

Here are some of the statistics. About half of “all Americans over the age of 18 are married, but an increasing number of them have been married before.1 Over the past ten years, the number of cohabiting adults over the age of 50 has increased dramatically, from 2.3 to 4 million.2 More than one-quarter of married men in their seventies report having had an intimate relationship with someone other than their spouse.3 The grey divorce rate—the divorce rate for those age 50 and older—doubled from 1990-2015, although it remains significantly lower than the rate for those under 50.4 Almost a third of Americans (30%) have a step- or a half-sibling.5 Approximately 1.4 million adults identify as transgender.6 As many as 5% of Americans are polyamorous, having serious intimate relationships with more than one person at the same time.7 Approximately 40% of children are born to unmarried mothers, but more than a third of those mothers are cohabiting at the time they give birth.8 There are more than half a million frozen embryos in the U.S.9 and the futuristic possibility of freezing oneself has already arrived. Plus, health care advances have extended our lives; the average 65-year-old can expect to live approximately 20 more years.10

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So when a new client asks about estate planning, or existing clients seek to update their plans, or fiduciaries determine beneficiaries, there are increasing numbers of potential complexities to consider, including, but not limited to:

- Gray divorce;
- Blended families and stepchildren;
- Nonmarital cohabitation;
- Single parents by choice;
- Multinational families;
- Children born through assisted reproductive technologies; and
- Transgender, or gender non-binary, or gender fluid individuals.

These complexities mean that planning for all modern families is mostly about drafting for flexibility, so that, for example, drafting a trust to benefit “sons” does not potentially unintentionally exclude a child who is transgender—but “not so much flexibility that the client’s estate plan will dissolve if..."
for example, a surviving spouse grows estranged from the decedent's first family. Any planning for modern families must include considering financial issues that might arise during as "well as after any relationships, incapacity arrangements, funeral wishes, changing technology (who will be able to find those bitcoins?), and privacy as the client accounts for the potential of multiple family members who may not have a harmonious relationship. It is not easy for the modern estate planner.

This article discusses some of the important considerations to address with clients in the planning process before reviewing various drafting techniques.11

Considerations

This section addresses questions involving the determination of family members. Confirming the status of the client's potential heirs and legatees ensures that the right ones will be included, and others excluded, preventing inadvertent disinherance and unintended "windfalls."

Adult partners. "An increasing number of couples never marry, with more than 8 million nonmarital couples.12 Marriage rates are down, approximately half of where they were in 1970. Moreover, the age at marriage is increasing; while the average woman married at 20 in 1963, today, it is 27 for women and 29 for men.13 And, while divorce rates are down from their peak in 1979, the grey divorce rate keeps increasing.14 Divorce rates for those who have remarried are higher than for those in a first marriage.15

These demographic realities are important for advising clients about planning for their own relationships and for those of their children. Consider that not all states treat trusts the same way at divorce, so prenuptial agreements (typically the province of family law practitioners) and trust drafting are profoundly affected.

Determining a client's marital status can be harder than it looks. States recognize different ways of becoming a spouse, through either a ceremonial or a common law marriage. States also recognize that even someone who was never validly married might have rights as a spouse if that person can prove putative spousal or if state law accords members of a civil union or domestic partnership spousal rights.16 Certain methods of attaining the status of a spouse may be available in some states and not others, so choice-of-law issues are critical. In all states, an individual who was legally married in a sanctified ceremony to the decedent as of the date of death meets the definition of a surviving spouse.17 State law establishes both substantive restrictions (like age) and procedural restrictions (like the need for a valid license) in order for a marriage to be valid. If there is a technical irregularity, such as an invalid marriage license, then statutes in some states will invalidate the marriage; otherwise, due to the strong public policy in favor of upholding marriages, the noncompliance will not invalidate the marriage.

In a small number of states, couples can create a common law marriage through their conduct and
mental state even in the absence of a formal ceremony. In those states, couples can enter into a common law marriage by: (1) living together (in some states, for a certain amount of time); (2) holding themselves out as married; and (3) having the mutual intent to be married. Once formed, a common law marriage is valid for all legal purposes and can be dissolved only through formal divorce (there is no such concept as common law divorce).

And common law marriages are portable; even a state that will not allow its residents to enter into a common law marriage may recognize such a marriage from another state. Accordingly, it is very important to distinguish common law marriage from "mere" cohabiting relationships.

Once a marriage is valid, it can be ended only by divorce, annulment, or death.

Regardless of the existence of a legal spouse, a client may need to address the possibility of a putative spouse. A putative spouse is a person who cohabited with the decedent in the good faith but mistaken belief that he or she was married to the decedent. For example, a couple might marry believing that a divorce was final—when in fact one member of the couple was still legally married to someone else. The second marriage is thus invalid under bigamy laws.

Conferring the status of "spouse" on a putative spouse is straightforward if the putative spouse is the only person claiming to be the decedent's surviving spouse. That person takes the share that a legal spouse would take. The problem becomes more complicated if there are multiple claimants—e.g., if the intestate decedent is survived by both a putative spouse and a legal spouse, or by two or more putative spouses. Careful planning can avoid claims by a putative spouse, or protect one, if that is the client's intent.

Finally, there may be nonmarital partners. A client could be involved in several intimate relationships at the same time through polyamory, or may be married with a nonmarital partner, or may be divorced and living with a new partner, or may have a long-term partner and be involved in a LAT (living apart together) relationship.

**Child.** A child is defined based on a legally established relationship with a parent, and does not include a stepchild, a foster child, or a descendant of a child. A major question then, is just how to establish the parent-child relationship. For that, it is important to refer to state laws outside of the probate area. The marital presumption in effect in all states means that offspring of a married couple (regardless of the sex of the spouses, as reaffirmed in a 2017 Supreme Court opinion) are presumed to be the children of their parents. The difficulty of rebutting that presumption depends on state law.

When parents have children with more than one partner, and the offspring are related by the half-blood, most states do not distinguish between half-blood, whole blood, or adopted siblings. The age at which a child is adopted may be relevant when the "donor is someone other than a parent." And, under the stepparent adoption provisions of the UPC (and some states), it is possible for an adopted child to inherit from both legal parents and the birth parents.

Assisted reproductive technologies (ART) involving donor eggs, donor sperm, surrogacy, and posthumous conception have created challenges for estate planning, regardless of whether the children are born to married or unmarried heterosexual or same-sex couples or to single parents. The UPC clarifies that a child born through assisted reproductive technology to married parents who use a third-party donor is a child of those parents, and not of the donor.
many states have not yet grappled with all of the possibilities created by new technology in defining the parent-child relationship pursuant to inheritance law.

For posthumous children, those born after the death of a parent, the traditional common law approach was that a child born within 300 days of a married parent’s death was a child of that parent.27 What happens when a child is born after that time period? Because states have made different policy choices concerning reproductive technology and estate efficiency and fairness, posthumously conceived children in one state might qualify, while those across a state border might not.28

At common law, nonmarital children had no inheritance rights.29 That changed in early America, when they were given the right to inherit from their mothers.30 During the second half of the 20th century, the Supreme Court decided a series of cases that recognized the rights of nonmarital children to inherit from their legally recognized fathers. Indeed, the UPC provides that marital and nonmarital children are treated equally with respect to inheritance.31

The real question remains proving parenthood. That matter is more likely to arise with respect to fathers, although the Uniform Parentage Act (2017) develops procedures to establish parentage that “apply equally without regard to gender.”32 When parents are unmarried, paternity must be established in order for a man to be recognized as the legal father of a child. The two primary approaches to establishing paternity are adjudication and voluntary acknowledgment of some sort.

**Drafting and advising**

Below are goals to achieve when advising clients:

**Flexibility.** Ensuring maximum flexibility requires attention to the substantive provisions—as well as their phrasing.

**Gendered pronouns and definitions.** It may be worth discussing Caitlyn Jenner with clients to show the importance of flexibility, and to ensure that clients want to build that flexibility into their estate planning. When drafting, attorneys can use the term “spouse,” rather than “husband” or “wife”; or “child,” rather than “sons or daughters” or even names (“Bruce Jenner” may have different claims than “Cailyn Jenner”). Because ART is likely to “increase, it might be important to draft provisions that explicitly include children conceived in this way. On the other hand, clients may want to ensure some parental relationship with a child who claims. DNA testing can result in a child inheriting assets from a parent he or she never knew. Some clients may decide not to include biological children who have no relationship with the family in an estate plan.

**Powers of appointment.** Consider granting each generation broader powers of appointment (POAs) beyond just descendants, for example, to anyone other than creditors, the estate, self, or creditors of the estate. But, as with so many suggestions for flexibility, planning must be tailored or granular “to that particular client. Some client circumstances will be best served by a very broad special POA, while others require more limited POAs. But, the incorporation of POAs into documents has and will continue to grow in importance as a tool to add flexibility “to plans. However, the growing use of powers demands that estate planners encourage clients to come back for more frequent periodic reviews to go over and fine-tune the implications of powers and other concerns.

**Trust decanting/trust protector.** Consider provisions that explicitly allow for trust decanting and that allow a trust protector to make amendments. This takes some thought as to who should hold the protector powers and the impact on the overall plan.

Decanting powers provide further flexibility to anticipate unintended consequences. For example, in Ferri v. Powell-Ferri.34 a trust created by the husband’s father allowed the son, Paul Ferri, to withdraw an increasing portion of the
trust property. When his wife filed for divorce in Connecticut, Paul was entitled to withdraw about 75% of the principal. Although most other states would consider the trust separate property, not divisible at divorce, Connecticut is one of about a dozen states that permits “all” property to be divided. Shortly after the divorce filing, the trustees decanted the assets into a new trust (they did not obtain Paul’s consent, nor even inform him), effectively eliminating Paul’s power to withdraw. The decanting was an effort by the trustees to remove the trust property from Paul’s marital estate, and, although it was not explicitly authorized by the trust provisions, the court ultimately permitted it—but only after protracted litigation.

Clients should have periodic reviews with their advisor team to address these issues. Further, at some point in this process, the settlor should be encouraged to bring in the next generation so they become familiar with the planning, including use of powers. Indeed, communication is critical. If an estate plan comes as a surprise, or if people feel left out, unfairly treated, or even deceived, then this could lead not just to litigation but also to emotional division among family members.

**Marriage, divorce, remarriage, and nonmarital relationships.**

“The goal should be to plan for marriage, divorce, and nonmarital partners with flexibility and precision to maximize the client’s options. A subsidiary goal is to protect family privacy, such as by limiting the information included in wills, which will become public documents.

**Prenuptial agreements.** While prenuptial agreements are more common in second marriages, they should be considered for any marriage. State law varies on just what is procedurally necessary for an enforceable agreement, but typically requires that the agreement be (like any other contract) voluntary and not unconscionable. It should also include full disclosure, or a knowing and voluntary waiver of that disclosure.

The substantive provisions can identify the separate property owned by each party prior to the marriage to ensure that it remains separate and can specify how property acquired during the relationship is to be owned. The agreement can also address rights at death; for example, each party might agree to waive the elective share.

**Planning during marriage.** Couples frequently seek to engage in joint estate planning, and there is, of course, no ethical prohibition against doing so. Such planning should discuss protection for all children, joint or otherwise. If the spouses want to establish a joint trust, then, to protect against future change, the trust should become irrevocable at the death of the first spouse. If the elective share has not been dealt with through a prenuptial agreement, then a postnuptial agreement is a possibility for addressing that issue and others that might arise.

**Divorce.** While divorce is the province of family law practitioners, there is substantial overlap with issues central to a trusts and estates practice in areas such as beneficiary designations for nonprobate assets, wills, and trusts. Most states’ laws will automatically revoke any revocable instrument (including a will as well as nonprobate instruments) with respect to any disposition of property made under the document to a former spouse, and states increasingly extend that revocation to family members of the ex-spouse. Estate planners (and family law practitioners) should not rely on those statutes and should instead take affirmative steps to ensure that an ex-spouse is no longer a beneficiary, if that is what a client seeks. Note also that state revocation-upon-divorce statutes do not, as the Supreme Court has repeatedly affirmed, cover pension and insurance plans that are subject to ERISA.

It is thus critical to check beneficiary designations at divorce lest they override the client’s estate plan. A “superwill,” which supersedes beneficiary designations, is not generally respected outside of Washington State. Clients need to understand the differences between primary and secondary beneficiaries. Thus, an individual might want to name a spouse and children as primary beneficiaries, along with a designation of the percentage that each will receive. Clients should comply with plan documents to change beneficiary designations.

Where there may be other concerns, such as an ex-spouse’s role in a family’s irrevocable trusts, it may be a good idea to include a provision at the time of document drafting (or through subsequent amendment) that enables future removal of a spouse from controlling “fiduciary positions in the wake of divorce. On the other
hand, if the client wants to continue to benefit a stepchild, then that intention must be explicitly protected.

Consider also that clients may want to take steps upon separation; while separation may be relatively close in time to a divorce decree, it might also take months or years before that final dissolution order, so a separation agreement may be warranted. Specifying "legal separation" as the time when a spouse's rights end might be important in drafting other documents, but only if there is also an option to reinstate the spouse upon reconciliation.

Cohabitation. When a client wants to include a cohabitant in estate planning, the same considerations are relevant. One big difference, however, is that while intrasposual transfers are tax-free, and the second spouse to die can inherit any unused portion of the decedent spouses' estate tax exemption, that is not true for a nonmarital cohabitant.39

Cohabitation/nonmarital partner agreements. Regardless of whether the client has only one partner or is in a polyamorous relationship, a cohabitation agreement can protect the client (at least in most states). Such an agreement is similar to a prenuptial agreement and can cover whether the client wants to keep income, real and personal property, and gifts separate or convert it into joint ownership, as well as how any expenses incurred during the relationship, such as mortgage or rental payments, should be treated. If each partner wants to change beneficiary designations on retirement accounts or insurance plans, then those could also be covered. If there is a joint child, then the parents can enter into an agreement; note that the enforcement of any agreement concerning a child is subject to a court's consideration of the best interests of the child.

Advance medical directives. "Estate planning is, of course, not just about wealth. It is also about health. Clients should specify the type of end-of-life medical treatment that they want in a living will or similar document: "Do they want tube feeding, for example? Do they want to donate their organs? A second decision, particularly important where the client has remarried or has a nonmarital partner, is choosing who to authorize to make health care decisions on the client's behalf through a health care power "of attorney. Clients are most likely to consider a spouse or child. Note that, when an individual is hospitalized, stepparents may cut off access and information to their spouse's children, or children may cut off access to a stepparent. A brief discussion of Casey Kesem's situation in which that happened might be relevant.

Clients may also want a do not resuscitate (DNR) or Physician Orders for Life-Sustaining Treatment (POLST). These are established by doctor order, rather than attorney drafting.

Only about one-third of Americans have some form of advance medical directive, and, even though the rate is higher for those over the age of 65, less than half of that population has one.41

A related concern is death and burial issues. A client should consider disputes between a surviving spouse and stepchildren and specify their wishes in writing.42 Fights at death are not just about money but can also be on where someone is to be buried, what rituals attend the burial, and even just where family members should be seated.43

Conclusion
Planning for the modern family requires a comprehensive review of the client's intent with respect to the rights of any and all family members. Various documents can be drafted to effectuate that intent, ensuring both flexibility and protection.