Till Death Do Us Part (Again)

Estate Planning for Second Marriages

By Richard E. Barnes

If you were to go back and review your most challenging estate planning files over the past few years—the ones in which emotions ran high throughout or the clients left with some bad feelings, either at you or at one another—the odds are that at least one of the clients was in a second marriage.

Counseling multiple-marriage families is hard. With death and divorce creating ever-larger numbers of individuals available to remarry, these families quite possibly constitute a significant portion, if not a majority, of an estate planner's practice. Unfortunately, these families and their particular issues receive relatively little attention in the estate planning press.

This article seeks to answer two questions:

1. Why is it so hard to counsel multi-married families?
2. What can be done about it?

Why Is It So Hard to Counsel Multi-married Families?

Multiple-marriage families present seven principal challenges. Of these, the presence of unresolved emotional issues and the existence of multiple sets of children create the most likely barriers to a successful outcome—a finalized plan that reaches the parties' desired dispositive goals without unnecessary tears. Any of the seven issues listed page 35, however, can enflame emotions and threaten to disrupt the process.

Estate taxes present a special concern. To avoid unintended and inequitable results, an estate planner must attend to how the estate will pay any taxes and the manner in which several sets of beneficiaries and different types of assets will share the tax burden. If the documents do not adequately address this issue, one set of beneficiaries may enjoy an inheritance undiminished by estate taxes, yet another set of beneficiaries may see its inheritance reduced or eliminated. The second set of beneficiaries may, in

Richard E. Barnes is a member of the Valdosta, Georgia, firm of Elliott, Blackburn, Barnes & Gooding, P.C.

Corbis/Photo Illustration by Andrew O. Alcala

essence, pay the estate tax on the first set's inheritance. This inequity may not be discovered until after the second spouse's death when planning options are much more limited.

What Can Be Done About It?

When dealing with multiple-marriage clients, two steps are critical. First, the estate planner needs to use a carefully considered engagement letter that spells out whom the planner represents and addresses what will happen in the event of conflict. The planner should disclaim any representation of or responsibility for the children of the spouses. ACTEC has model engagement letter forms available on its web site at www.actec.org. A planner should always remember that the more children with competing goals there are, the more disappointed beneficiaries there may be, which equates to more potential plaintiffs!

Second, the planner can deal with the issues discussed in this article most appropriately if he or she has knowledge of them early in the estate planning process. Using a comprehensive checklist, supplemented by in-depth client interviews, can ensure that the planner obtains the necessary information and can respond to it at the outset.

Dealing with Unresolved Emotional Issues

Left unresolved, emotional issues from a client's previous relationship can negatively affect decisions made in the estate planning process. For many of these clients, the last contact with an attorney may have been in the context of a difficult divorce. The process of meeting in a lawyer's office, discussing the division of assets, and struggling over the treatment of children may recall similar agonizing issues raised in the divorce. The estate planning client may begin to view the process as adversarial, which can rekindle frustration and animosity experienced in the earlier divorce and spark conflict between spouses or with the attorney planner.

The substantial emotional effects caused by the dissolution of a marriage can linger for many years. Healing takes time, and it is not uncommon for individuals to enter into new relationships before fully recovering from the previous one. Planners need to understand these issues.

Anticipating the likely tension and being sensitive to signs of conflict as they arise are huge steps toward minimizing the severity of the problem. In addition, alerting clients in advance to the potential for some turbulence along the way may weaken the potential for quarrels. The sample letter shown on page 36 is an example of one way an attorney can alert clients to the fact that the estate planning process can be difficult and emotional at times. The important thing is to keep clients in the here and now, reassure them that conflicts are not unusual, and try to exude empathy and sensitivity while pressing on toward the goal.

Dealing with Multiple Sets of Children

Frequently, remarried individuals have children from a previous relationship, as well as one or more children from the current relationship. Discussions over how to plan for the children can easily become combative.

Clients may need to be reminded that the desire to provide for biological children is strong and does not indicate any current emotional attachment with the previous partner. Complicating this may be a somewhat strained bond with the child from the previous relationship—whether that bond is between the new spouse and the child or the biological parent and the child, or both.

A planner may wish to use a trust, direct provider payment (such as tuition or medical expenses), or other technique that provides for the child without placing the inheritance under the control of the "other" biological parent. Using separate assets or life insurance to fund the inheritance also may avoid having to dip into the expected pool of assets available for the other spouse's children or the children from the current relationship.

Seven Challenges Presented by Multi-marriage Families

1. Unresolved emotional issues negatively impacting current decision making.
2. One or more sets of children from current and previous relationships (blended families).
3. Support obligations to a previous spouse or children.
4. Increased likelihood of an antenuptial agreement.
5. Substantial age differences in spouses (the May/December romance).
6. Wealth disparities in spouses (fiscal unequals).
7. Who pays the estate taxes (apportionment)?

Dealing with Support Obligations to a Previous Spouse or Children and Antenuptial Agreements

Whether it is a support obligation or an antenuptial agreement, obtaining the relevant documents detailing the client's continuing responsibilities and conducting a thorough review are essential. Frequently, the estate planner will need to press the client to obtain copies of the settlement agreement or final divorce decree. The estate planner must confirm that the terms of the agreement are being met, such as establishing and funding any required trusts, purchasing any necessary insurance, appropriately designating beneficiaries, and making any contractual provisions for the previous spouse and/or children.

Antenuptial agreements also need to be reviewed to confirm that they are currently effective, as many contain "sunset" provisions. In addition, the estate plan must reflect the dispositive provision agreed on by the clients as

reflected in the antenuptial agreement. If the clients wish to vary their current estate plan from the provisions in the antenuptial agreement (because, for example, some years have passed and the wealthier spouse wishes to make greater provision for the other spouse than is required), the planner should carefully document the variance and insert language in the estate plan to avoid a potential conflict. If the variance requires amending the antenuptial agreement, the spouses may need to obtain separate counsel.

An antenuptial agreement may include a waiver of each party's rights to the other's retirement plans. A potential trap lurks in such provisions, however. A pre-marital waiver of spousal benefits for certain retirement plans may not be effective because applicable Treasury Regulations require the parties to be married at the time of signing the waiver. If the antenuptial agreement purports to waive spousal rights to retirement plan assets, the estate planner may need to obtain waivers that have been signed after the clients were married.

Dealing with Substantial Age Differences in Spouses (The May/December Romance)

Substantial age differences between spouses are not confined to the movie-star set. These age differences can present a problem, and not just because of the special rules for computing minimum required retirement plan distributions when the participant is more than 10 years older than the participant's spouse.

The children of the elder spouse may resent or distrust the younger spouse. General Chuck Yeager's 2003 marriage to a much younger spouse triggered a dispute that continues to estrange the retired general and test pilot from his children. Before his remarriage, General Yeager's adult daughter lived next door to him and managed his money following his first wife's death. His attempts to resume management of his finances following his remarriage have been resisted by his adult children.

Earlier this year, a Nevada County Superior Court judge ordered Yeager's adult daughter to repay almost $1 million in funds received through the sale of family assets. More recently, General Yeager sued each of his children, accusing them of diverting money from his pension fund. To date, the family has spent over two years in litigation, all initially arising out of a remarriage to a younger spouse.

If the younger spouse is close in age to the elder spouse's children, the children will not want to wait for the younger spouse to die before receiving the bulk of their inheritance. A standard QTIP trust can place the children in the unenviable position of having to wait, creating likely conflict between the children and the younger spouse and producing resentment toward the trustee administering the trust. When appropriate, a large outright distribution, an irrevocable life insurance trust naming the children as beneficiaries, or a QTIP trust capped at a fraction of the estate may provide funds for the children immediately while still providing for the surviving spouse and lessening the animosity between the children and the younger spouse.

Dealing with Wealth Disparities in Spouses

Wealth disparities in spouses (so-called fiscal unequals) can create a host of difficult issues. One spouse may not have enough assets to fund fully that person's applicable exclusion amount. The wealthier spouse may reject the idea of

Sample Letter

Dear Client,

Thank you for setting up an appointment to discuss your estate planning. For our meeting, I will need for you to bring in the financial information we discussed on the telephone. I have attached to this letter a detailed list of the information I will need. I assure you that the information you provide will be held in the strictest confidence.

I wanted to speak for a moment about what your expectations should be in this process. Planning your estate can be one of the most important and exciting things you can do, as it allows you to make decisions today about how best to care for your family once you are gone. We will discuss a number of options for your consideration.

The estate planning process can also be somewhat stressful. You have mentioned that you both have children from prior marriages/relationships, as well as children together. In our meetings we will be discussing how to provide for these children in accordance with your wishes, as well as providing for the disposition of your individual and joint assets. However, it would be most helpful if the two of you could discuss these issues in advance of our meeting so that you might familiarize yourself with each other's expectations.

I salute the two of you for initiating this process and I look forward to working with you.

Very truly yours,

Friendly, Friendly, Kinder & Gentler, LLP

transferring outright sufficient assets to fund that amount. Without equalization, the clients will lose valuable tax savings if the less-wealthy spouse passes first.

When both spouses have children, resentment is likely to surface if the wealthier spouse supports his or her children in a more lavish manner than the less-wealthy spouse. The fiscal unequals also may have some unspoken tensions regarding their wealth disparities that surface in the estate planning process. Because of societal and gender issues, the tension and potential for conflict may increase when the man is the less-wealthy spouse.

To address these issues, knowledge of the likely tension can be helpful, as is discovering the disparity as soon as possible in the process. If it is a potentially taxable estate and the wealthier spouse is unwilling to make an outright disposition to fund the less-wealthy spouse's applicable exclusion amount, a joint revocable trust may be a helpful vehicle. See Beth A. Turner, *Joint Revocable Trusts: New Flexibility in an Old Form*, Prob. & Prop., July/August 2005, at 48.

Dealing with Who Pays the Estate Taxes (Apportionment)

Estate tax apportionment is beyond the scope of this article, perhaps beyond the scope of the number of pages of this magazine put together. With that caveat, this discussion should at least consider the basics of apportionment.

In most wills and in most states, the burden of paying the estate taxes falls on the "rest, residue and remainder" of the estate. If the plan calls for deferring estate taxes until the second spouse's death, the inheritance of the beneficiaries of the residue of the second-to-die spouse will be diminished by the estate taxes—essentially, those beneficiaries "pay" the taxes because they end up with less. In a first-marriage situation, this may not matter because all of the beneficiaries of the first spouse to die are probably the same individuals as those who would be the beneficiaries of the surviving spouse. In one form or another, then, these individuals would shoulder the tax burden at some point in time.

In a second-marriage situation, this may not be the case. Assume Husband has two children and Wife has two children, each from a prior marriage. Husband's will may well provide for a generous bequest to his children, and Wife's will may intend to do the same for her children with the expected residue of her estate. If Husband passes first and estate tax is payable at Wife's death, then Husband's children may have received their full inheritance,

The estate planner needs to be familiar with the issues and concerns common to multiple-marriage families to address adequately the needs of such families in the estate plan.

while Wife's children may receive little or nothing after all the taxes are paid. Wife's children are likely to be very unhappy with this and may want to marshal whatever assets they do have to pursue a claim against the attorney who engineered the estate plan.

The issue also can arise when inheritances pass outside the will, either through a nonprobate asset (life insurance proceeds, transfer on death accounts, right of survivorship property) or through a trust or other document. Despite the fact that these assets may pass outside the will, they may still be includable within the decedent's gross estate for tax purposes. The lucky beneficiary of the life insurance policy gets the proceeds tax-free; the unlucky beneficiaries of the residue pay the tax. If a portion of the estate passes in a trust outside the will, that trust will likely have its own tax payment provisions, which may conflict with those in the will.

To determine whether an estate plan may give rise to special apportionment issues, a planner should look for the following warning signs:

- beneficiaries of large nonprobate assets or large specific bequests are not the same as the beneficiaries of the residue,
- beneficiaries of each spouse's will are not the same, and
- beneficiaries of nontestamentary trust assets and beneficiaries of the residue are not the same.

If any of these warning signs appear, a planner should take these steps. First, he or she should consult a more comprehensive source on tax apportionment such as the BNA Tax Management Portfolio on Estate Tax Apportionment authored by Prof. Jeffrey Pennell, or Daniel B. Evans, *Tax Clauses to Die For*, Prob. & Prop., July/August 2006, at 38. Second, the attorney should discuss the issue with the clients and document how they wish to treat this issue. In certain situations, the clients may elect to pay a portion of the estate taxes at the first spouse's death to ensure that the residuary beneficiaries of the second-to-die spouse are not forced to foot the bill for everyone. Finally, the provisions of the wills and any planning documents should reflect the clients' wishes and should be revised if they conflict with one another.

Conclusion

Multiple-marriage families present special challenges for estate planners and frequently require heightened counseling, increased sensitivity, and vast stores of patience while testing the depth and variety of the estate planner's bag of tricks. The estate planner needs to be familiar with the issues and concerns common to multiple-marriage families to address adequately the needs of such families in the estate plan. ■