Relationship-Focused Estate Planning: The Blended Family

By Jan Cummins
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Relationships between people are the foundation of all estate planning. Without beneficiaries and executors, trustees, attorneys-in-fact or health care agents, all estate plans would be meaningless documents – just so much paper and ink.

The acceptable roles that people can play in legal relationships have become much more varied over time. Historically in America, by far the most common personal lifestyle for an adult has been one monogamous marriage that lasted until death in old age, with remarriage of the surviving spouse being very rare. Marriage was traditionally about the accumulation and preservation of property and the rearing of children, and issues of individual personal satisfaction were subservient to those goals. Most marriages resulted in children. A minority of people never married, and another minority were divorced with children. The few divorced or widowed people who remarried were pioneers, bringing together the children from their former union into a new family structure, which is often called a "blended" family.

The common denominator of blended families is that they involve legal relationships around children and property that are more complicated than are found in a traditional marriage. Changes in the form of these blended families are happening fast, and they take a variety of forms that the law is struggling to keep up with. While traditional "single marriage with children" families do still exist and are the ideal for most of us, they are rapidly losing majority status.

Whatever the cause, probate litigation within families is increasing, and these blended families are overwhelmingly in the arena. We all have heard sad stories of either elderly spouses or adult children being deprived of an inheritance they had believed they would receive but that did not appear, allegedly due to the malevolence of another beneficiary or a biased fiduciary. The actual cause of the dispute is usually the existence of a poorly constructed legal document created by the deceased owner of the property, or the lack of any such document, combined with mistrust between and among the beneficiaries. The damage is the same no matter what the cause, and it is usually irreparable once the original property owner is out of the picture. It is also preventable. With proper careful planning on the part of the property owner, taking the people involved and their relationships with each other into full account, a carefully crafted estate plan can create a solid foundation for long-term family harmony.

Blended families can especially benefit from relationship-focused estate planning. When the marriage is new and all are hopeful and everyone is happy with each other, this is the best time to realistically look at the potential responsibilities each of the partners faces, developing a plan together for how those responsibilities will be dealt with as time goes on. For those who can tackle such a project, the rewards are likely to be great. The couple will have established boundaries for their marriage that will serve them well for years to come.

The good news is that many people who are caught up in this new demographic trend of blended families are also very aware of the need for realistic relationship-focused estate planning. They are aware that planning for the possibility of death, disability or divorce does not bring any of these things on. Quite the contrary, it is akin to the "bring an umbrella so it won't rain" school of thought.

For instance, let's imagine a hypothetical blended family and see how they might plan to avoid blended family pitfalls.

Audrey, 48, and Ralph, 56, were recently married. They both have prior marriages, and have children from those marriages. Audrey has three teenage children who live with them; Ralph has four adult children who are either in college or working and living on their own, with occasional visits to stay with their father.

Audrey and Ralph's financial situations are significantly different:

> *Audrey is employed, owns a condominium valued at $400,000.00, but which is mortgaged for $250,000 and which she now rents out. She receives regular child support payments from her ex-husband, but they are not sufficient to support herself and the children. Her salary is modest and the child support will end when each child reaches the age of 18, which will happen very soon. Although her children's father previously indicated that he plans to contribute to their college education, there is no formal agreement to that effect, and he is currently out of work. Audrey has no savings; her total net worth is approximately $200,000.00.*
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> *Ralph, on the other hand, is on strong financial footing. He owns a townhouse that is worth $1.5 million and is mortgage free. He has other assets, including retirement benefits, which total about $6 million, bringing his total net worth to $7.5 million. He earns $200,000 in annual salary with good health, life insurance and retirement benefits. He is paying for all the college expenses of his two children who are still in school.*

Ralph, Audrey and Audrey's children have been living in Ralph's townhouse since their marriage, and Ralph pays all of their living expenses except for those that are directly related to Audrey's children. They have been looking for a home of their own, but have not yet bought one because they are not in full agreement as to whether they will own that home together or it will be Ralph's separate property. That is why they have come to talk about an estate plan that will include a marital property agreement. They want to establish the rules of their new marriage in regard to money, property and their obligations to their children now, before big problems arise. They have seen enough issues arise already with two and soon three children in college to convince them that they need a plan to see them through this transitional and financial challenge to their relationship.

Audrey's position

Audrey is very aware that she has much less in the way of money and property than does Ralph and always will. Her earning capacity does not match his. She would also like to be working less, not more, once they get their own home together, as she wants to spend her time and energy creating a happy and beautiful home for them both. She would like to continue working part time for social and professional reasons, but she would like to cut her hours. She is also keenly aware that the father of her children may not be able to help with college costs and they will fall on her alone. She wants to be sure that her children have the same kinds of opportunities that Ralph's children have had. She knows that otherwise, it would breed resentment in her children against Ralph's children, especially since Ralph has been the main father figure for her two sons for the past 2 years and will hopefully continue in that role for the rest of his life. Her sons adore Ralph, as does her daughter.

Audrey also wants to be sure that the home they move into together is hers as well as Ralph's. She plans to invest herself into making it a home, and she thinks she should have the financial and physical security that it could give her in the future.. She feels that if they don't own their home equally it won't be theirs together in the same way.

Ralph's position

Ralph feels that he is already giving a great deal to Audrey by fully supporting her and paying for room and board for her children, as well as acting as a father to her children. He is concerned about his commitment to his own children and wants to be sure that it is not minimized by his acquisition of a new family. He also is aware of the difference in their respective financial positions, and wants to be generous with Audrey as a consequence. But he also knows that he can't control whether or not there will be a divorce, and if there should be a divorce, what that divorce could cost him. He wants to be sure that his net worth is not drained by divorce as it was before.

Ralph is not opposed to sharing the value of the new home with Audrey, but he wants to be cautious. He knows that they will want a big house, because they will be housing at least five growing and grown children at times for the foreseeable future. And they will need to live in a reasonably expensive neighborhood so as to ensure good schools for Audrey's children who are still at home. So it will represent a big investment that will force him to take on a mortgage or use some of his savings, in addition to the money he gets for the sale of his home. He is not eager to hand half of that over to Audrey immediately. He believes that they have not been married long enough and have not even known each other long enough for him to feel comfortable that things are going to work out for them. But on the other hand, Ralph definitely does not want another divorce, and he loves Audrey and likes her children. He wants nothing more than to have a happy marriage with Audrey. He would share all of his money with her if he could be sure of that, but his head tells him to hold back and to preserve a good portion of it for his children from his first marriage before making a financial commitment to Audrey.

Audrey and Ralph already both have some separate property. Their income since their marriage is all community property, unless they formally agree to a different arrangement. Each of them wants to be sure to preserve something for his or her own children, if possible.

The legal documents that will be needed here will be:

1. *A Marital Agreement;*

2. *Either a Revocable Trust referring to the Marital Agreement and recognizing each spouse's separate property but also allowing for the establishment and management of community property;*
   Or, alternatively, Separate Property Trusts for each of them;

3. *Pourover Wills for each of them;*

4. *Disability Documents for each of them:*
   a. *Durable Power of Attorney for Property Management;*
   b. *Advance Health Care Directives.*

The Marital Agreement is a very important part of this type of an estate plan. It spells out whether each party will keep his or her income as separate property and will list the properties that exist as separate property as of the date of the agreement. It can provide a process by which a voluntary transfer of separate property into community property can be made. This will particularly impact the purchase of a new home. The agreement can specify how title will be held, and in their case probably must do so, as that is their main point of conflict at present. Just what that will be will have to be decided by them in a mediation type of setting with their attorney's guidance. Other areas that should be decided in the marital agreement are the status of their earned income, whether it should be separate or community property; and the primary beneficiary status of any retirement benefits, as the law favors spouses inheriting these financial instruments. When the marital agreement is drafted and approved by both Audrey and Ralph, they should each take the agreement to an independent attorney for review, to ensure the legal validity of the agreement in case of a later dispute.

Once the Marital Agreement is established, the Trust or Trusts will hold the property to avoid probate and thus protect the privacy of the family. The other legal documents are those that everyone should have, in any estate plan. There are also some ancillary documents that will accompany the principal legal documents to ensure their validity and enforceability.

During the planning process, Audrey and Ralph may want to confer with their children, particularly over issues as to who might eventually serve as trustee, once either or both of them is unable to continue serving in that role.

A good estate plan that is well thought out with the sensibilities of all the people involved is a good way to start the dialogue and establish awareness in the children of their joint responsibilities for preserving this blended family as a happy and harmonious one.

While Audrey and Ralph demonstrate a blended family that is reasonably typical for the Silicon Valley area of California, there are many variations on this theme, particularly with much older people. Late in life divorces or the death of a spouse from accident or terminal illness leaves many widows, widowers and divorced people who may wish to remarry in their Seventies, Eighties and beyond. Most of these people have children, grandchildren and property, and are creating new blended families. The planning principles remain the same, no matter what the ages of the individuals involved.

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