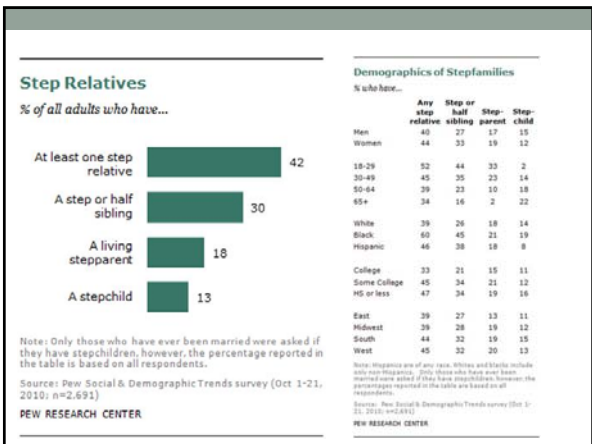


LONG TERM CARE PLANNING FOR BLENDED AND NON-TRADITIONAL FAMILIES

Introduction

- More than four in ten American adults have at least one step relative in their family
- In 2016, 18 million adults were in cohabitating relationships





Create a Relationship of Trust

- *Practice Tip:* Make your client comfortable knowing that their family situation is common and their case is something that you can handle.

Information Gathering

- Confidential Client Questionnaire
 - How long has the couple been together?
 - Children from prior relationships?
 - Children together?
 - Spouse died, relationship with stepfamily?
 - Who does each partner want to benefit when they are living?
 - Who does each partner want to benefit when they die?

Representation Issues

- Individual vs. Power of Attorney for Individual vs. Power of Attorney personally
- Conflicts between spouses or partners

Representation Issues

- *Practice tip:* Prepare a joint representation letter for planning for spouses or unmarried partners that is reviewed with the couple and that the clients and you sign.

Planning for Long Term Care

Pre and Post Nuptial Agreements

- Valid Contracts
 - But, Filial Support and Doctrine of Necessaries
- Department of Human Services does not recognize Pre and Post Nuptial Agreements

To Marry or to Not Marry?

- CSRA and MMMNA
- Does one partner hold a majority of the assets?
- What are the type of assets held by each partner?

Use of Irrevocable Trusts

- Create Separate Irrevocable Trusts
 - Planning acts like Post Nuptial Agreement
 - Ensures that estate plan is not changed at the death of the first spouse/partner
 - Each spouse/partner can provide for their chosen beneficiaries
 - Each spouse/partner can have their own trustee

Use of Irrevocable Trusts

- Create a Joint Irrevocable Trust
 - Limits flexibility at first spouse's passing
 - Can be too restrictive
- Limited Powers of Appointment
 - Testamentary
 - Lifetime

Use of Irrevocable Trusts

- Considerations
 - Real Estate
 - Life Estates
 - Life Leases
 - Realty Transfer Tax Issues
 - Five Year Look Back for both, if spouses

High Assets and/or Income

- Private Pay
- Life Insurance
- Long-term Care Insurance
- Revocable Living Trusts

To Gift or Not To Gift

- Community Spouse Planning is Not Always the Goal
 - Look at Powers of Attorney for “Hot Powers”
 - Review any Pre or Post Nuptial Agreements
 - How were assets titled throughout marriage?

To Gift or Not To Gift

John and Mary are married. It is a second marriage for both. Both have children from prior marriages. John has been admitted to a skilled facility. Mary and John's assets are as follows:

- House: \$180,000.00 TE
- Vehicle: \$14,000.00 Joint
- Bank Accts and Investments: \$80,000.00 Mary
- Bank Accts and Investments: \$120,000.00 John
- IRA \$50,000.00 Mary
- IRA \$80,000.00 John

- John's Max Resources for Medicaid: \$8,000.00
- Mary's CSRA: \$123,600.00

To Gift or Not To Gift – Option 1: Treat Institutionalized Spouse as Single Person

- John's power of attorney outlines that he only wants gifting to his children. John and Mary intend to keep their assets separate.
- Use John's \$200k for gift/annuity plan to protect portion in trust
- Pros:
 - Community spouse planning is not utilized to move assets from one spouse's name to another.
 - Prevents possible issues with John's children from prior marriages being cut out of any inheritance if Mary receives assets and does not name John's children as the ultimate beneficiary in her will.
 - Assets are kept separate.

To Gift or Not To Gift – Option 1: Treat Institutionalized Spouse as Single Person

- John's Power of Attorney of John states that he only wants gifting to his children. John and Mary intend to keep their assets separate.
- Use John's \$200k for gift/annuity plan to protect portion in trust
- Cons:
 - Treated as a gift for both spouses
 - Mary may need some of John's assets to maintain lifestyle
 - The plan does not address the primary residence

To Gift or Not To Gift – Option 2: Community Spouse Planning with DRA Annuity

- John wants gifting to spouse and his power of attorney document allows for this gifting. John and Mary do not have any agreements that prevent this gifting.
- Assets could be transferred to Mary up to her max CSRA. Mary could purchase a community spouse annuity with additional assets.
- Draft wills/set up beneficiary designations to benefit both children. An elective share will could be prepared which would limit the amount that John would receive if Mary passed away first. A deed could be prepared to transfer the residence to Mary to ensure the residence did not pass to John if Mary were to pass first.

To Gift or Not To Gift – Option 2: Community Spouse Planning with DRA Annuity

- John wants gifting to spouse and his power of attorney document allows for this gifting. John and Mary do not have any agreements that prevent this gifting.
- Assets could be transferred to Mary up to her max CSRA. Mary could purchase a community spouse annuity with additional assets.
- Pros:
 - Qualify for Medicaid while saving assets for community spouse.
 - A greater value of assets could be saved.
- Cons:
 - Assets are in the name of the community spouse.
 - Community spouse can change will and beneficiary designations.

To Gift or Not To Gift – Option 3: No Gifting

- John has a prenuptial agreement addressing this issue. John and Mary agree to spend their individual assets down on care. If there are assets owned by the community spouse those would need to be used on care, those could be protected with community spouse annuity.
- You could spend down John's money on his care.
- Pro:
 - If assets to be kept separate from prior marriage, no comingling for care cost purposes.
- Cons:
 - There is a potential that no assets are passed on to John's children.
 - Mary may need additional assets to maintain lifestyle.

Spousal Refusal

42 U.S.C. Section 1396r-(5)(c)(3)(A)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(3) Assignment of support rights The institutionalized spouse shall not be ineligible by reason of resources determined Page 3539 TITLE 42—THE PUBLIC HEALTH AND WELFARE § 1396r-5 under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

Spousal Refusal

- Community Spouse refuses to use his or her assets for the institutionalized spouse's care
- Institutionalized spouse assigns his or her right to seek support against the Community Spouse to the State
 - Institutionalized spouse needs to have capacity or a power of attorney document or guardianship that allows for this
 - If institutionalized spouse is unable to assign his or her rights, the State can bring a support action against the community spouse
- Support Order issued, but payment of care is at Medicaid rate, not private pay rate

Spousal Refusal

- *Practice Tip:* The Community Spouse and the institutionalized spouse need to have separate counsel. Be careful to review for any possible conflicts that would prevent you from representing one of the spouses.

Spousal Refusal

- Strong facts for a spousal refusal case include:
 - A second marriage
 - A pre-nuptial agreement in place supporting your position
 - Assets kept separate during marriage
 - You are truly protecting only the assets of the community spouse (not transferring/gifting all of the assets to non-institutionalized spouse first)
 - Community spouse is refusing to cooperate to provide information on their individual accounts needed for you to complete your client's MA application
 - Community spouse's whereabouts are unknown

Transfers by Community Spouse after Medicaid Eligibility

- Community Spouse transfers excluded assets to the children or beneficiaries of the institutionalized spouse after eligibility
- Excluded assets for both (but, primary residence) won't effect either spouse's eligibility
- Transfer of CSRA won't effect institutionalized spouse's eligibility
 - Use of Family Agreement
 - 5 year look back for Community Spouse
- Better plan for a healthy and younger Community Spouse

Transfers by Community Spouse after Medicaid Eligibility

- Example: John and Jill are in a second marriage. John has 2 children from a prior relationship. John came with \$200,000.00 to the marriage. Jill came with \$50,000.00. Jill has a large monthly pension income that she just began to receive. John needs long-term care services. Jill is in very good health.

Transfers by Community Spouse after Medicaid Eligibility

- Assets are transferred to Jill to fulfill her maximum CSRA and a community spouse annuity is purchased with the amount above the CSRA. Jill agrees that after the transfer is made to her, she will transfer a certain portion of this amount (\$75,000.00) to John's two children.

Divorce

- Equitable Distribution
 - Marital Property
 - Generally, acquired during the marriage by either party, unless:
 - Received by gift or inheritance and kept in their own name
 - Appreciation in value during the marriage is marital property
 - Typically does not matter how the property is titled, unless received by gift or inheritance

Divorce

• Equitable Distribution

- 23 Pa. C.S.A. § 3502
- 11 factors in distribution

Equitable Distribution

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

Equitable Distribution

- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.
- (10) The economic circumstances of each party at the time the division of property is to become effective.
 - (10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.
 - (10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.
- (11) Whether the party will be serving as the custodian of any dependent minor children.

Divorce

•Capacity to Divorce

- Concern about a spouse's mental capacity to enter into a divorce, consent to a divorce, or participate in litigation, if necessary
- Consider requesting the appointment of a guardian ad litem for the incapacitated spouse

Hypothetical I

- Nicholas and Alice signed a pre-nuptial agreement prior to marriage.
- Nicholas has very little in the way of assets due to spendthrift behavior for years.
- Alice has a sizable amount saved.
- Alice is younger than Nicholas, but surprisingly needs long-term care services before him.
- Nicholas has one child from a previous marriage and one child from his current marriage.
- Nicholas comes to you with their pre-nuptial agreement, which states that their assets prior to marriage are to be kept separate. He has heard about spousal gift and annuity planning, and thinks that sounds like a great option to him. What advice do you give to Nicholas?

Photo: Wenn.com

Hypothetical II

- Tom and Gisele are married. Gisele comes to your office. Tom isn't doing so well health wise, and his capacity is slipping.
- He had a rough time in February that he still is suffering from and may need long-term care before he thought.
- Both Tom and Gisele have substantial assets in each of their names and joint assets.
- Tom has one child from a prior marriage and Tom and Gisele have two children together.
- Surprisingly, they do not have a pre-nuptial agreement.
- Gisele wants a divorce
- What advice do you give to Tom and Gisele?

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QUESTIONS?
