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Ethical Issues In Representing Husbands and Wives In Estate Planning

Beyond the general differences that may arise as a husband and wife consider an estate plan are some common situations that by their very nature raise potential conflicts of interest between the spouses.

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There are a number of reasons why representing both the husband and wife in estate planning makes sense. Spouses generally consider the estate planning process as a joint undertaking in which their shared interests will be woven into a coordinated estate plan to accomplish their goals. Engaging a single lawyer to prepare the estate plan for the family unit is often an effective and cost-efficient method of accomplishing the couple's goals.

From a tax planning perspective, coordinating the estate plans of the husband and wife presents significant opportunities. With two annual gift tax exclusions, applicable exclusion amounts, and generation-skipping transfer tax exemptions at the estate planner's disposal, the estate planner has double the tools with which to craft an estate plan for the couple that minimizes total gift and estate taxes. Also, the unlimited gift tax marital deduction for U.S. citizen spouses provides a mechanism for transferring assets between the spouses, with no

transfer tax consequences. This deduction can be used to allocate assets between the spouses to take advantage of the graduated gift and estate tax rates.

Many estate planners may not recognize, however, the potential and actual conflicts of interest that may exist when an attorney is asked to represent a couple in estate planning. Codes of professional conduct regulating the ethical conduct of attorneys may impose special constraints and obligations on the estate planner who represents a married couple. This column will describe a number of the potential conflicts of interest that estate planners may face in representing husbands and wives in estate planning and will discuss the steps that the estate planner should take to comply with applicable ethical rules when representing a married couple.

Shared and Divergent Goals—Understanding Possible Conflicts of Interest

Husband and wife clients often share basic estate planning

goals. These shared goals can include: a desire to provide for the continued well-being of the surviving spouse, providing for the support and education of the children of the marriage, and minimizing the portion of the parties' estates that must be paid in transfer taxes. Husbands and wives often have similar opinions about how to protect the minor children's share of the estate, and about the choice of guardians and other fiduciaries for the children and the estates.

Husbands and wives may have different opinions and interests relating to a number of estate plan decisions. One spouse may value the creditor protection and control that are provided by having the surviving spouse's share of the estate held in trust. The other spouse may favor the freedom and simplicity of an outright disposition of assets to the surviving spouse. One spouse may believe that children should be given early responsibility for wealth, while the other spouse may favor holding that wealth in trust for a more extended period. Charitable inclinations and interests may vary between the husband and wife. On a fundamental level, the desire to save taxes may be more strongly held by one spouse. One spouse may be willing to pay taxes in order to accomplish the substantive goals that he or she desires.

Beyond the general differences that may arise as a husband and wife consider an estate plan, are some common situations that, by their very nature, raise potential conflicts of interest between the spouses. The existence of a prenuptial agree-

ment, the second marriage situation in which there are children from the first marriage, and the existence of gifted and inherited wealth, are all circumstances that may increase the chances of conflicts between the spouses. The estate planner must be mindful of these situations in determining whether, and in what way, representation of both spouses may be undertaken.

Existence of Prenuptial Agreement

An attorney should not serve as counsel for both parties in the negotiation of a prenuptial agreement. The negotiation of such an agreement often involves the waiver of statutory rights otherwise available to spouses. It also involves the negotiation of affirmative financial obligations by the spouses to each other upon death or divorce. While the ultimate goals of the parties may be similar, the waiver of statutory rights indicates an actual conflict of interest that requires separate counsel. Further, under applicable state law, the enforceability of the prenuptial agreement may require the representation of each party by independent counsel.

When an estate planner is asked to represent both a husband and wife who have already executed a prenuptial agreement, the existence of the agreement should alert the estate planner that there are contractual obligations between the parties that may raise a potential conflict of interest. The spouses may disagree about the interpretation of and mode of fulfilling the obliga-

tions undertaken in the agreement. In addition, the factors that are often catalysts for the execution of a prenuptial agreement—such as significant gifted or inherited wealth, or a second marriage—may suggest possible conflicting interests between the spouses. While the existence of the agreement does not preclude joint representation in the preparation of an estate plan, it should highlight that discussions with the couple should take place at the initiation of the representation. These discussions ensure that the couple understands the nature and the scope of the representation being provided.

Second Marriages and Blended Families

When either the husband or wife has been married before, there is the possibility of conflicting interests. When there are children of a first marriage, there will often be a balancing of the desire to provide for the surviving spouse and for the children of the first marriage. The decision whether to leave assets outright or in trust to the spouse may be influenced by a parent's desire to ensure that the assets remaining at the death of the surviving spouse will pass to the children. This goal may conflict with the surviving spouse's desire for the control of those assets and to be free from the trustee's oversight.

Even where a marital trust will be used to defer estate taxes on the portion of the estate in excess of the applicable exclusion amount, the use of the traditional combination of the marital trust and credit shelter trust will mean that the children of

the first marriage, who may sometimes be contemporaries in age to the surviving spouse, will be forced to wait until the death of the surviving spouse to derive substantial benefits from the estate. Resentment and strained relations between the children of the first marriage and the surviving spouse are a real possibility. The estate planner must be sensitive to these potential conflicting interests and interpersonal issues.

Gifted or Inherited Wealth

When one spouse has acquired significant wealth through gift or inheritance, the tension between handing down the wealth to the next generation and sharing the wealth with one's spouse can raise conflicts between the husband and wife. Pressures placed on the married couple by other family members, who seek to interject themselves in the estate planning process, can exacerbate these tensions.

The Ethical Rules

The ethical rules that regulate the conduct of attorneys are promulgated by the states in which those attorneys practice. State regulations are most often based upon the American Bar Association Model Rules of Professional Conduct (the "Model Rules") or their precursor, the Model Code of Professional Responsibility (the "Model Code"). Since the majority of states have adopted the newer Model Rules, this column will focus on the applicability of these rules to the estate planning situation.

One frequent criticism of both the Model Code and the

Model Rules is that they are drafted with the business lawyer and litigator in mind, rather than the estate planner. Thus, extracting guidance from the Code and Rules as to the proper course of conduct for those working with individuals and families in a planning capacity is not an easy task.

It has been argued that in the married couple estate planning situation, the family may be seen as the client.¹ Rule 1.13 of the Model Rules expressly recognizes that an attorney may represent an organization that is distinct from its individual members.² However, the Comments to this rule do not specifically refer to the family as an "organization" within the contemplation of the rule. To the contrary, the Comments' description of an organizational client is as a "legal entity, [that] cannot act except through its officers, directors, employees, shareholders, and other constituents."³ This description does not neatly fit the dynamics of the family relationship in the estate planning context. The family lacks a formal decision process established by law, and the husband and wife can act individually to establish their own estate plans.

Another Model Rule, Rule 2.2, permits an attorney to serve in the role of "intermediary" between clients.⁴ The Comments to this Rule define the intermediary role as "seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. . . ." In the intermediary role, "[t]he lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual inter-

ests."⁶ Some commentators have suggested that the estate planning attorney is acting as an intermediary when representing both the husband and wife in estate planning.⁷ Other commentators do not see this Rule as applicable in the context of husband/wife representation because this endeavor does not focus on establishing or adjusting a relationship between clients. Instead, the undertaking focuses on the couple's relationship with third parties, such as the taxing authorities and those who will take the family's wealth when both spouses have died.⁸

Viewing the estate planning attorney as an intermediary does not free the attorney from dealing with the impact of actual or potential conflicts of interest between the husband and wife client. Rule 2.2 permits the attorney to serve in the role of intermediary only if:

- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
- (3) the lawyer reasonably

believes that the common representation can be undertaken impartially and without improper effect on the other responsibilities the lawyer has to any of the clients.⁹

Similar obligations and constraints are imposed upon the estate planner if one views the engagement not as the attorney acting as an intermediary, but as the representation of two individual clients who may have conflicting interests. Rule 1.7 of the Model Rules sets forth the ethical rules that apply when an attorney is considering representing two individual clients with actual or potential adverse interests.

Model Rule 1.7(a) provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.¹⁰

Model Rule 1.7(b) addresses cases in which the interests of the clients are not directly adverse, but the lawyer's ability to represent one client may be limited by the lawyer's responsibilities to another client:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to

a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.¹¹

There are two requirements common to both Rules 2.2 and 1.7: First, the requirement that the attorney reasonably believe that the common representation can be undertaken without adversely affecting the lawyer's responsibilities to each client. Second, the requirement that the clients be informed of the advantages and risks of the common representation and consent to the joint engagement.¹²

Complying with the Ethical Rules

The estate planner must be aware of the applicable ethical rules and comply with them at the commencement of an engagement to represent both a husband and wife in estate planning. The Comments to Rule 1.7 expressly refer to estate planning as one type of engagement in which conflicts may arise. The Comments also recognize that analyzing the potential for conflicts in non-litigation contexts such as estate planning may be "difficult to assess."¹³ Under such circumstances, according to the Comments, "[r]elevant factors in determining whether there is a potential for adverse

effect [from common representation] include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise."¹⁴ For example, if an estate planner has represented one of the spouses for a substantial period of time or has a close personal relationship with one of the spouses, the estate planner should carefully consider whether he or she can represent both spouses with equal zealotry and neutrality.

In the estate planning context, the presence of some circumstances discussed above, such as a second marriage, gifted and inherited wealth, or a prenuptial agreement, should also prompt careful scrutiny of potential conflicts. If the estate planner makes a threshold determination that the existence of an actual or potential conflict will *not* interfere with the representation of both clients, the estate planner must nevertheless consult with the clients, explain to them the implications of the common representation, and obtain their consent to it.

Confidentiality

The consultation with the married couple should include a description of the potential conflicts that may arise in the representation. The attorney should also discuss the effect of the joint representation on the confidentiality of the information that each client discloses to the attorney. If each spouse were separately represented, then confi-

dences between the attorney and the client would be protected from disclosure to the other spouse. When both the husband and wife are clients, it is important to delineate the nature of the engagement and how confidences imparted to the attorney will be treated as between the spouses. In a common representation, the obligations under the ethical rules to keep the client adequately informed¹⁵ and to protect client confidences¹⁶ require a delicate balance.¹⁷

In a 1993 report on the ethical issues confronting the lawyer representing husbands and wives, the American Bar Association (ABA) Section on Real Property, Probate and Trust Law recognized two modes of representation of the husband and wife in estate planning: joint and separate.¹⁸ In a joint representation, both spouses are clients joining together to accomplish a mutual goal.¹⁹ In a separate representation, each spouse is a separate client entitled to the lawyer's counsel for his or her interest.²⁰ Both the ABA Section and the American College of Trust and Estates Counsel ("ACTEC") call for a *presumption* that a representation of a husband and wife is joint, in the absence of a written agreement to the contrary.²¹

When consulting with potential husband and wife clients on the mode of representation and the issues of confidentiality, the estate planner should inform the clients at the outset of a presumption that they authorize the lawyer to make full disclosure to each of them. This means that any information received from either the husband or the wife

has been executed by both of them, unless there is a written agreement to the contrary. This presumption will ensure that the couple understands the parameters of the common representation and the possibility that information imparted concerning the representation may be shared with both spouses. Such an approach will avoid the problematic situation in which one spouse imparts information to the attorney in confidence which, in fairness, ought to be shared with the other spouse. If the lawyer is prohibited from sharing that information with the other spouse, the lawyer may be in a position of having to withdraw entirely from the engagement, which can result in additional costs and recrimination.

One method of providing a husband and wife with information about potential conflicts and the parameters of the common representation is to include information on this subject in the introductory materials shared with clients at the commencement of the representation. The presumptions regarding the mode of representation and client confidentiality can be clearly set forth in those materials. The attorney can then be available to discuss any questions that the clients have about either subject in the materials. Routinely sending these materials to potential husband and wife clients can minimize the possibility that the attorney will fail to raise these issues in any particular case.

Conclusion

The role of "family counselor" that many estate planners fill for their clients is a valuable one. The estate planner must not lose sight, however, of the ethical issues that are raised when multiple family members look to the estate planner for legal services and counsel. It is essential to comply with the applicable ethical rules relating to common representation of a husband and wife in estate planning. It is essential both to fulfill the inherent obligation of the estate planner to comply with these rules and to ensure that the clients' legal needs are met, expectations fulfilled, and relationships protected.

Notes

1. See Russell G. Pearce, *Proceeding of the Conference on Ethical Issues in Representing Older Clients: Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 *FORDHAM L. REV.* 1253, 1269-70 (1994).
2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995).
3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1995).
4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1995). Rule 2.2 is controversial. Some states, such as Massachusetts, have omitted this Rule on the ground that representation of more than one client should be covered by MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, Conflict of Interest.

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1992).
6. *Id.*
7. See, e.g., Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).
8. Teresa Stanton Collett, *And the Two Shall Become As One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J. L. ETHICS & PUB. POL'Y 101, 118 (1993).
9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1992).
10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).
11. *Id.*
12. Disciplinary Rule 5-105(C) of the Model Code contains similar requirements. Multiple representation may be undertaken if it is "obvious" that the attorney can represent the interests of each client and each client consents to the multiple representation. See MODEL CODE OF PROFESSIONAL CONDUCT DR 5-105(C) (1995). This requirement has been construed to mean that an attorney's ability to represent a client must be "free from substantial doubt." *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1348 n.12 (9th Cir. 1981).
13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1995).
14. *Id.*
15. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1995).
16. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).
17. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1995).
18. Special Study Committee on Professional Responsibility, ABA Section of Real Property, Probate and Trust Law, *Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765, 771 (1994).
19. See *id.* at 778.
20. See *id.*
21. *Id.*; see also American College of Trust and Estate Counsel Foundation, ACTEC *Commentaries on the Model Rules of Professional Conduct*, 28 REAL PROP. PROB. & TR. J. 865, 917 (1994).