Estate Planning to Protect Children of Divorce

by Vincent L. Teahan

INTRODUCTION

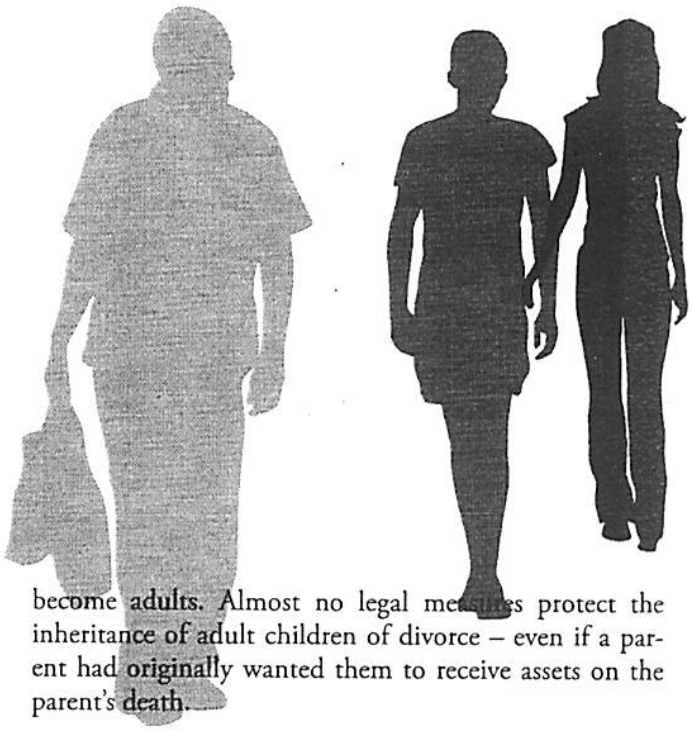
Upon the death of one or both parents, adult children of divorced parents all too often find that, despite expectations – and maybe assurances – they have inherited nothing, or very little. The parent (usually the father) may not have intended to disinherit his[1] adult child. The parent may have initially, years back, fully planned to leave assets to children from the first marriage.

What happened? And what can the legal profession do about it? As it turns out, there are specific steps attorneys, particularly those in the matrimonial and estate planning areas, can take to assist divorcing parents who wish to safeguard a future inheritance for their children despite their remarriage.

The impetus for this article comes from the increasing number of representations our office has handled that involve disinheritance problems of blended families. Typically, the prospective client is an adult child from the decedent's first marriage who comes to us after their parent or stepparent has died. The child has received little or nothing of an expected inheritance. We have found, in a number of cases, that there was little that we could do to improve the child's situation. As with many estate planning complications, such problems could have been easily dealt with before the parent's death. Afterward, however, it is often too late to find a cure for the disinherited client.

There is more than a little urgency here. The U.S. population is aging.[2] The rate of divorce has generally evened out in the United States. The major exception is in this aging population over 50 where the rate doubled between 1990 and 2010.[3] Not surprisingly, there is a concurrent rise in late-life remarriage.[4] The number of adult children impacted by these demographic changes is large and getting larger. Add that many in the younger generation are struggling to build wealth in the new globalized economy. More than ever in the past, family inheritance is key to maintaining their [childhood] standard of living. We are mindful that most families have little to leave children these days, particularly after the expenses of protracted old age. Still, millions of property owners are going to have trillions of dollars to bequeath over the next 20 to 30 years. The question of who is going to receive these bequests will become increasingly urgent.

Unintended disinheritance can often be traced back to the parent's failure to protect their adult children upon the parent's divorce or during remarriage. We distinguish adult children here from minors. Inheritances for minor children of divorcing parents are frequently protected by provisions in a separation agreement or divorce decree that require parents to make life insurance (or testamentary) provisions for children under age 21. However, these protections for children usually end when they become adults. Almost no legal measures protect the inheritance of adult children of divorce – even if a parent had originally wanted them to receive assets on the parent's death.



Under New York law (and that of many other states), children have no inheritance rights that a parent cannot defeat by executing a will, or other equivalent non-testamentary measures or property-holding devices like revocable trusts, joint accounts, life insurance or IRA designations.[5] By contrast, other legal systems, particularly in Civil Law, provide for forced heirship that gives children largely indefeasible legal rights upon the death of a parent.

A separation agreement can require a parent to leave assets to children of the first marriage. However, several factors may prevent this from happening. First, parental non-performance of legal inheritance obligations is often not enforced. This is especially likely because the children of the first marriage may not know about, or have access to, their parents' divorce documents. In addition, despite a divorce agreement stipulating inheritance to their children, legal and/or moral obligations to a new family (including a new spouse, children born of a second or subsequent marriage, and stepchildren of a new spouse) can gain precedence over the parent's previously strongly felt obligation to his children from his previous marriage. In some cases, disinheritance may result from incompetence or inattentiveness rather than malice on the part of a child's divorced parent. In other cases, a father's new partner may feel protective of her family over her husband's previous family.

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THE "TYPICAL" DIVORCE/REMARRIAGE PROBLEM

"Every unhappy family is unhappy in its own way," wrote Tolstoy, beginning *Anna Karenina* – where the main characters did not divorce. A lot fewer magazines would be sold, and websites clicked, if children could not complain about how they were abandoned by divorcing parents or mistreated by stepparents (especially stepmothers). There are frequently primal forces that can keep so-called "blended families" divided.[6] Questions concerning family inheritances confront divorced and re-coupled families with powerfully divisive forces.[7]

While we acknowledge that no situation is typical, the following fact pattern is commonly encountered by attorneys: A child's father and mother have divorced, and the child's father, sooner or later, has remarried a second wife who may (a) be younger (at times considerably so) than the child's father, (b) have children of her own from an earlier marriage (stepchildren) and/or (c) the father and new partner go on to have children together.

Marriages generally begin with the best of intentions. Perhaps because of this, property dispositions by spouses in these second (and third) marriages are often not specified in a pre-nuptial agreement. Over time, a second marriage can involve the increased mutual support obligations of the spouses toward each other. Property is titled in joint names. The designation of pension rights, by law, under the Retirement Equity Act of 1984,[8] beneficiary designations made on life insurance policies and other sometimes gradual shifts of property rights and asset ownership may combine to secure a stepparent with all of, or a substantial amount of, the assets that the child of the first marriage would consider the due inheritance of the "first family." The spouses in the second marriage often avoid the question of prior children, assuring each other that "Each of us will take care of the kids, and the other's kids, just like they are our kids."[9]

But later, due to all of the factors above, when the father of children from the first marriage dies, the second spouse/stepmother inherits all or nearly all of his substantial assets. If the deceased father was 80 on his death, and the second spouse/stepmother is 70, the deceased father's children could be 45 to 55 years old. In many cases such disinheritances occur at a time when adult children are paying their own children's (deceased dad's grandchildren's) college tuition, or encountering a "wake up" time for adult children to begin thinking about their own retirement. Nevertheless, in many cases, even when there were substantial assets, no inheritance passes to the child.

The relationship of the second spouse with her stepchildren, the children of her spouse's first marriage, is likely weaker than that with her own children. Her own children are also likely to be less established in life than her older stepchildren. Additionally, the second spouse may have sacrificed some of her career earning potential to care for the second spouse, and with this, may legitimately feel entitled to a measure of security. She may be worrying about how to finance her own impending old age – a significant problem when Americans are living longer and longer.[10] An impressive pot of money at age 65, not increased by earnings from employment or by capital appreciation, can dwindle substantially if the owner lives to be 95. Nursing home and end-of-life care expenses only worsen this problem.

Pre-nups are often experienced as an expression of lack of trust in the new relationship. We perhaps need to reframe pre-nups as basic protection for adult children of the first marriage.

Whatever the parent and stepparent's justifications, rationalizations and wishful thinking, the adult children of a parent's first marriage find themselves getting little or nothing on the death of their remarried parent, or on the later death of their stepparent.

NEW YORK PARENTS CAN DISINHERIT CHILDREN

A child of an intestate parent – even a remarried one – has the right to inherit in New York under the laws of descent and distribution.[11] Often, however, this inheritance right can get vastly diminished, usually by "asset drift" to the second spouse through non-probate property such as joint tenancy/tenancy by the entirety, pension designations (as discussed above under the Retirement Equity Act of 1984), IRA designations, and life insurance. The longer a second or subsequent marriage endures, the greater this potential asset drift occurs toward the second spouse (and her progeny), and away from the children of a prior marriage. As a result, the inheritance rights of an adult child all too often turn out to be virtually worthless.

LEGAL REMEDIES TO PREVENT DISINHERITANCE

Time-honored legal measures exist to secure children's rights in the estates of remarried parents, while providing a stepparent with lifetime use of property. This can often involve a parent's creation of a lifetime trust for a

surviving spouse, who is frequently the stepparent of the children of the first marriage. Prominent among these types of trusts used to protect children of a prior marriage was the so-called "QTIP trust,"[12] at least before the introduction of a much higher estate tax exemption reduced the need of the predeceasing spouse to obtain the marital deduction, but it can be any trust where the remainder is paid to the children (typically of a prior marriage) on the death of a stepparent.[13]

But while the child's remainder interest in any trust for a surviving stepparent has been secured, it's also a future interest – and may only be paid out to the child far into the future, given today's lifespans. Furthermore, the child of the first marriage must outlive the stepparent. In the interim, adult children of the first marriage cannot take effective steps to make use of their economic interest, as the remainder interest in the trust may be impossible to assign.[14] Even if legally assignable, it may only bring a paltry price. Often the children of the first marriage and the second spouse may not be that far apart in age: This may significantly reduce the present value (to children of marriage one) of the remainder interest of a trust. For example, if a 50-year-old child survives a recently deceased 80-year-old father, the present value of his or her remainder interest in a $1 million trust upon the death of his or her 70-year-old stepmother[15] is $641,240 – significantly less than the full value.

Again, even a secure trust remainder interest isn't something a child can trade for cash, especially if the trust contains a spendthrift provision preventing assignment of the principal (remainder) interest. This means that the adult child-remainderman can't realistically hope to pay his children's college tuition with a remainder interest in a trust created by his parent for his stepparent.

PREVENTATIVE STEPS

Divorcing or divorced parent's lawyers have a major role to play in keeping the children of the marriage from going down the subtly relentless path toward disinheritance. There are a number of specific steps lawyers can take here. These include:

Upon Divorce

Provisions That Protect Children: Protections may include the customary provisions negotiated to provide support until age 21, including life insurance or testamentary provisions that the parents are supposed to provide for minors. These agreements should also include provisions that will protect children *after* they become adults.

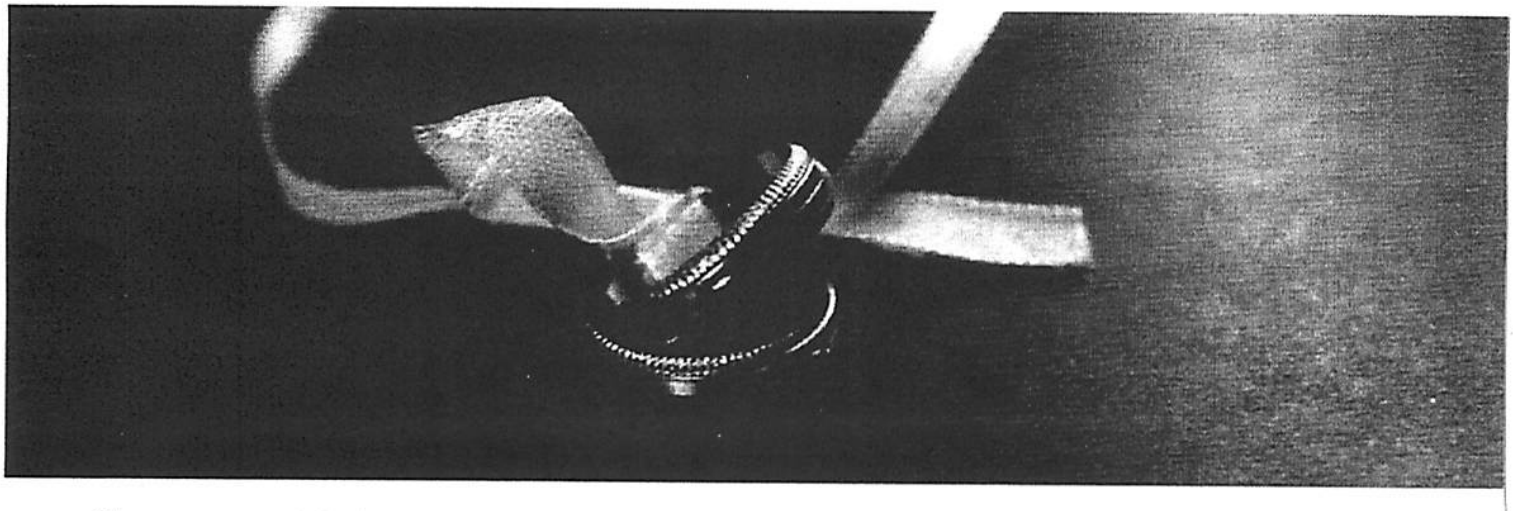
Effective Use of Life Insurance

First, let's discuss provisions that are frequently used to supply life insurance protection for children until age 21, or older, as a buttress to the divorcing parent's child support obligations. A typical clause may provide, as follows:

> **VI. Life Insurance:** The parties represent that they currently are the owners of the following life insurance:
>
> JOHN: Northwestern Mutual $ 500,000.00
>
> MARY: Northwestern Mutual $ 500,000.00
>
> The parties agree to maintain the above listed coverage or its equivalent, naming the children as beneficiaries and the other party as trustee until such time as the youngest child reaches the age of 21 and until all maintenance and child support obligations contained herein have been satisfied.
>
> Each party shall provide annual proof to the other that such insurance is in full force and effect, with all premiums paid up-to-date and no liens thereon, at least annually. Each party consents to the inclusion of a decretal paragraph or separate life insurance order being entered at or after the time the divorce decree is entered.
>
> In the event that either party shall fail to make the designations specified herein, the parties agree that their children shall have a claim against the decedent's estate in the amount that they would have received had this designation been properly carried through. The children shall additionally have a claim against the estate for any expenses incurred in order to effectuate this paragraph of the agreement.

This clause provides the children with some protection, through both mandatory, annual disclosure of premium payments and an enforcement mechanism (a claim against the estate of a non-compliant parent). But such protection can prove illusory if the parent seeking to protect the children does not insist on annual disclosure and the parent who is obligated to keep the policy in effect dies without having done so. While a claim would lie against the obligated parent's estate – for $500,000 in this case – what happens if there are insufficient assets in the obligated decedent's estate with which to pay the children? For example, the assets of the since-remarried parent might consist of a heavily mortgaged house (owned as tenant-by-the-entirety with the second spouse, a pension (statutorily creditor-proof) and life insurance (the proceeds and avails of which are exempt from creditors).[16] Under this scenario, the estate of the defaulting deceased parent may not have the assets with which to satisfy a judgment in favor of the disinherited children of the first marriage.

Additionally, the surviving parent must be able and willing to pursue enforcement because minor children are unlikely to know about the terms of their parents' divorce. (This raises the importance for lawyers to encourage divorcing parents to share the financial details of divorce agreements when children turn 21.)



I have encountered the fact pattern discussed above. The obligated parent dropped insurance coverage a few years before death, leaving nothing to the minor children of the first marriage.

Possible solutions:

1. When executing divorce agreements, insist that the policies are held by a third-party trustee. Because that trustee would have received notice that premiums were due, the defaulting obligated parent would not have been able to drop insurance coverage.
2. Alternatively, lawyers should require in the separation agreement that both divorcing parents receive notice of premiums due.

2. "Most Favored Nation" Clauses or Guaranteed Shares of Parent's Estate: Include provisions in separation agreements that stipulate that a parent shall treat children of the first marriage no less favorably than any child born thereafter. These provisions will apply to children even after attaining adulthood, as they will bind the divorced parent for his or her lifetime. These provisions should be drafted not only to cover a parent's will, but also to prevent him or her from avoiding his or her obligation through creation of testamentary substitutes including a funded revocable trust, which could undermine the children's estate interests. Again, lawyers need to encourage clients to make their children aware of such requirements so they can bring enforcement proceedings, if necessary.[17]

The "poorer spouse" should try to get such a provision included in a separation agreement to bind the richer spouse to take care of the children. Such a provision should cover any will, revocable trust, or other testamentary substitute that the richer spouse might try to use to try to defeat the provision requiring equality. Consider with your clients including in their separation agreement a provision under which the children of the marriage (upon attaining adulthood, if they are minors at the time of the parents' divorce) receive formal notice of their right to receive an inheritance/life insurance from a parent.

It should also be noted that unwritten promises to make will provisions may be well-meaning but are often legally worthless.[18]

Steps Lawyers Can Encourage After a Parent Divorces but Before Contemplated Remarriage

Lawyers have a role to play in educating clients to prevent accidental/inadvertent disinheritance by omission or "asset drift." Matrimonial and estate lawyers can begin educating clients about many of these moves at the time of divorce. Lawyers may want to consider educating mortgage and other financial professionals about the serious property consequences that can follow the signing of seemingly routine papers like bank signature cards, insurance beneficiary and transfer on death designations, and the like.

1. Protect Children by Not Remarrying: Divorced parents who want to protect property for their children and who have "significant others" should consider informal living arrangements instead of marriage. The social stigma formerly attached to cohabitation has been greatly reduced in recent years. Rates of cohabitation without marriage and "Living Apart Together" in a committed relationship are rising in the U.S., and are especially high in later-life recouplers.[19] Marriage still entails, among other things, an obligation of mutual support on the spouses.[20] This support obligation can, especially over time, jeopardize the assets of even well-off remarrying persons, particularly given the costs and risks of long stays in assisted living or nursing home facilities. Without remarriage, there are no such legal obligations in New York, at least.[21] Thus, persons considering remarriage should, in particular, consider the potential loss of assets to health care expenses of a second spouse (the stepparent of his children of a prior marriage).[22]

2. Encourage Remarrying Clients to Execute Prenuptial ("Pre-Nup") Agreements to Protect Children's Legacies: Few divorced parents execute prenuptial agreements before they remarry. One of the principal purposes in seeking a pre-nup is to avoid both New York's elective share right in a surviving spouse[23] and, to a lesser extent, the provisions to provide exempt property[24] for a surviving spouse. However, pre-nups might also serve as an

TEST YOUR KNOWLEDGE

a) Most disabilities are a result of on-the-job injury and freak accidents.
TRUE or FALSE

b) The average long-term disability lasts less than a year.
TRUE or FALSE

c) Social Security covers the majority of long-term disability claims.
TRUE or FALSE

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Answer key:
a) Musculoskeletal disorders and illnesses such as heart attack, cancer, and diabetes cause the majority of long-term disabilities, not freak accidents or injuries.[1]
b) 64% of initial Social Security Disability claims applications were denied in 2018.[2]
c) The duration of the average long-term disability claim is nearly 3 years (34.6 months.)[3]

[1,2] https://disabilitycanhappen.org/disability-statistic/ updated March 2018
[3] https://disabilitycanhappen.org/overview/ viewed Feb 2019

*Contact the Administrator for current information including features, costs, eligibility, renewability, exclusions and limitations.

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opportunity to (a) send a signal that property is to be kept separate, and that joint tenancies with a right of survivorship, and tenancies by the entirety (both of which shunt property away from the children of a previous marriage) are to be avoided except where specified in the agreement, (b) set expectations about expenses, including the possible costs of insurance coverage on the remarried parent of children, (c) set expectations that the remarried parent plans to bequeath significant assets to children upon his or her death, so that those children do not have to await the death of their stepparent.

Pre-nups are often experienced as an expression of lack of trust in the new relationship. We perhaps need to reframe pre-nups as basic protection for adult children of the first marriage.

Planning Considerations to Protect Children for Parents Who Have Remarried

1. Post-nuptial (Post-Nup) Agreements should be considered to stabilize clients' property holding regimes, especially where the spouses both have children from previous marriages and have not previously executed an antenuptial agreement, but own significant nontestamentary property (such as real estate held as tenants by the entirety, pension rights, and the like). Otherwise, a stepparent, merely by surviving, could gain complete control over all jointly held real estate and be in a position to leave all such property to his or her own children, to the exclusion of the other parent's children. Post-nups can require the break-up of residential real estate held as tenants by the entirety, and its conveyance to separate trusts, designed to protect the interests of each spouse's respective family while permitting a surviving spouse to occupy the residence until its sale.

   It has been my experience that these agreements can be negotiated on an amicable basis. After all, they protect both spouses, and their children, from arbitrary distribution of property based on which spouse dies first. Additionally, it is important to educate clients that these agreements can be made to deal solely with estate rights. They don't have to get into ticklish matters like disposition of property in the event of divorce. Of course, post-nups varying the spousal right of election have to be formally executed.[25]

2. Waiver of Elective Share Rights After Pre-nup is Ripped Up. Some remarried couples consider themselves happy enough to want to cancel the agreement they executed. Despite the urge to rip up a pre-nup, there is no reason why the parties have to cancel the agreement in its entirety. For example, spouses who are secure in their second marriage can get rid of the uncomfortable provisions of an existing pre-nup that discuss property division and maintenance upon divorce, but still execute a new, limited agreement designed to waive the elective share and/or other estate rights of the parties under EPTL 5-1.1-A – often in return for alternate bequests that are less costly than payment of the elective share would be to the predeceasing spouse's estate.

3. Avoid Nontestamentary Property Regimes that undercut inheritance for children. Real estate brokers and mortgage lenders need to educate remarried parents about how to exercise care before creating any tenancy by the entirety, joint property account with rights of survivorship and other non-probate holding devices or beneficiary designations. A parent's lack of knowledge here – frequently fostered by non-lawyer "advisors" – can partially or completely undercut a parent's plan for his or her children from a first marriage. As pre-nups frequently contain a provision that allows the spouses to make provisions for each other that are more generous than those required under the agreement, remarried persons should exercise special care when, for example, a spouse or the spouses buy(s) valuable real estate after their marriage. Here, they would do well *not* to title the real estate such that the survivor will take all.

4. Purchase of Long-Term Care Policies by remarrying spouses to cover against loss of property to nursing homes, thus protecting a parent's assets for children. That said, these policies are expensive and not everyone can qualify to buy one.

5. A Hard Look at the "Time Value of Money" After Remarriage: The client may have married a second wife who is much younger than he and not have entered into any agreement with her as to the disposition of property. It is important to educate clients to understand that any bequests he might make to his children taking effect upon the death of their stepmother, may have little value to his children. Indeed, the problem goes beyond a low present value for children because the children may *never* receive bequests after the death of a stepparent, as they may predecease her. It does not make great economic sense for a 75-year-old child to inherit property upon the death of a 90-year-old stepmother.

6. Consider Buying Life Insurance. One solution to this problem of colliding imperatives (the client's need to take care of the spouse, while making reasonable provision for children of a first marriage) is through the purchase of life insurance, payable to children of the first marriage upon their parent's death. Life insurance is also not a "testamentary substitute" for purposes of the surviving spouse's elective share.[26] This means that 100 percent of the insurance proceeds can be paid to the children, even if there is a surviving spouse.

7. Use Trusts to Plan Bequests for Parents of Divorced Children: Well-off parents of a divorced child (who is the parent of the family's grandchildren) should consider leaving property in trust, rather than outright, for the divorced child – so that family property can be protected from leakage to stepfamilies. An outright bequest to a divorced child could ultimately produce an asset over which a remarried child's surviving spouse (who is not the parent of the family's grandchildren) will have an elective share claim. A trust for the remarried child renders this problem moot. A secondary benefit of this approach is the asset protection offered by fully discretionary "sprinkle" trusts. Such trusts are designed to be free of Medicaid reimbursement claims. Also, sprinkle trusts can allow the trustees to pay income and principal currently to grandchildren, besides the married child.

8. Encourage Former Spouses to Coordinate Estate Plans. It makes sense for the divorced parents of children/grandchildren to coordinate their estate plans, so they can agree, to the greatest extent possible, on provisions for children, appointment of trustees, etc. It helps if ex-spouses share information about their estate plans. Here, divorced and remarried parents can thereby avoid a worst-case situation where one ex-spouse leaves minimal bequests to children of the first marriage, because he or she thinks the other ex-spouse will take care of them.

CONCLUSION

Unfortunately, the estate planning problems of blended families are not receding. A 2013 study by the Pew Research Center that 67 percent of previously married 55-to-64-year-olds have been (or are) remarried. For Americans over age 64, the figure is 50 percent.[27]

As I have observed in practice, even sophisticated clients often have no knowledge of the legal effect remarriage and nonprobate transfers can have on future legacies to their children by a prior marriage. The increasing number of families that face these problems would do well to engage attorneys to help them sooner, rather than later, in dealing with the complex estate planning issues connected with remarriage. This could potentially avoid the legal expenses of a will contest of a disinherited child. Consistent with this, matrimonial attorneys in particular are in a good position to raise these questions early when a client is considering a divorce or a remarriage.

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1. Throughout this article I have deliberately chosen to use "he" as the generic pronoun for the spouse disinheriting children from an earlier marriage. Based on my professional experience, the problem explored in this article most often concerns fathers whose estate planning does not provide for children of first marriages.

2. Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* 12 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

3. Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990–2010*, 67 Js. of Gerontology Series B: Psychol. Sci. & Soc. Sci, 731, 735. (Nov. 1, 2012) https://doi.org/10.1093/geronb/gbs089.

4. Susan L. Brown & I-Fen Lin, *Age Variation in the Remarriage Rate, 1990-2011*, National Center for Family & Marriage Research (2013), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-13-17.pdf.

5. There is also the small exemption available under the New York Estates Powers and Trusts Law 5-3.1 (EPTL) for children under age 21, where there is no surviving spouse. Most separation agreements/divorce decrees at least make provision for bequests to minor children of the marriage of divorcing couples if a parent dies leaving minor children. Again, the problem of inadvertent disinheritance predominantly arises with respect to adult children.

6. For the definitive work on family instability in America, see Andrew J. Cherlin, The Marriage-Go-Round: The State of Marriage and the Family in America Today (2009).

7. Patricia L. Papernow, Surviving and Thriving in Stepfamily Relationships: What Works and What Doesn't (2013); Patricia L. Papernow, *Therapy with Clients in Stepfamily Relationships: What Individual, Couple, Child, and Family Therapists Need to Know*, 57 Family Process 25 (2018).

8. "The Retirement Equity Act of 1984 (REA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to introduce mandatory spousal rights in pension plans so the choice of the form of benefit received from a pension plan was no longer solely the participant's choice. REA's legislative history shows that Congress viewed the marriage relationship as a partnership, and the retirement benefit resulting from that partnership as derived from the contributions of both partners. Before REA, the spouse of a plan participant had very few rights to share in that participant's pension benefit." IRM § 4.72.9.1.1(5) (2018), https://www.irs.gov/irm/part4/irm_04-072-009.

9. See Patricia L. Papernow, *Recoupling in Mid-Life and Beyond: From Love at Last to Not So Fast*, 57 Family Process, 51, 55 (2018) for a discussion on the difficulties that especially late-in-life stepparents face.

10. Colby & Ortman, *supra* note 2, supra.

11. EPTL 4-1.1(a).

12. "Under [pre-1982] law, the [estate tax] marital deduction was available only with respect to property passing outright to the spouse or in specified forms which gave the spouse control over the transferred property. Because the surviving spouse had to be given control over the property, the decedent could not insure that the spouse would subsequently pass the property to his children." Joint Committee on Taxation, General Explanation of the Economic Recovery Tax Act of 1981, 233 (Dec. 29, 1981).

13. QTIP "marital deduction trusts" are enabled by § 2056(b)(7) of the Internal Revenue Code of 1986, but non-marital and "credit shelter trusts created by the estate plan of a parent can also benefit the stepparent for life, with remainder to children of marriage of the first marriage.

14. Besides the statutory "spendthrift" protection for income interests under EPTL 7-1.5, trusts frequently provide that principal interests may also not be assigned. *See* Raymond C. Radigan, *Using New York Trusts for Asset Protection*, 4, https://cdn.ymaws.com/www.epcnyc.com/resource/resmgr/EPD_2015/New_Yorkers_Handour.pdf

15. The remainder value is $641,240, from IRS Publication 1457, Table S, using the applicable Federal Rate of 3.4% effective for October, 2018. (Note also that the remainder value for a 60-year-old stepmother is $513,920.) These IRS charts, while updated, still have not kept up with the remarkable increases in the life expectancy, particularly of well off, well-educated Americans. If you are a remainderman of a trust with a healthy 70-year-old stepparent as income beneficiary, you can plan on waiting a long, long time before you see the principal paid to you.

16. N.Y. Ins. Law § 3212(b)(1).

17. In *In re Wenzel*, the Appellate Division dealt with an attempt of a divorced father to avoid a Will provision (required by a Separation Agreement) to equalize the daughter of the first marriage with any later children. 85 A.D.3d 563, 564 (1st Dep't 2011). The Court enforced an equal division of the decedent's residuary estate. *Id.*

18. Under EPTL 13-2.1, any agreement or promise to make a testamentary provision is unenforceable unless it is in writing and subscribed by the person against whom it is to be enforced (though persons who actually provide services, especially care, can be compensated for same). EPTL 13-2.1.

19. Jacquelyn J. Benson, *Living Apart Together*, in The Social History of the American Family: An Encyclopedia 818–820 (Marilyn Coleman & Lawrence H. Ganong, eds. 2014); Susan L. Brown & Sayaka K. Shinohara, *Dating Relationships in Older Adulthood: A National Portrait*, 75 J. of Marriage & the Fam. 1194–1202 (2013).

20. N.Y. Fam. Ct. Act § 412.

21. Claims for "palimony" and to impose constructive trust can, however, apply in other states.

22. *See* Anthony J. Enea, Esq., *Are You Absolutely Sure You Want to Get Married/Re-Married?*, https://www.esslawfirm.com/Articles/Are-You-Absolutely-Sure-You-Want-to-Get-Married-Re-Married.shtml.

23. EPTL 5-1.1-A.

24. EPTL 5-3.1.

25. EPTL5-1.1-A(e)(2).

26. *In re Boyd*, 161 Misc. 2d 191, 197 (Surr. Ct., Nassau Co., 1994).

27. *See* Gretchen Livingston, *Chapter 2: The Demographics of Remarriage*, Pew Research Ctr. (Nov. 14, 2014), http://www.pewsocialtrends.org/2014/11/14/chapter-2-the-demographics-of-remarriage/.