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Report From Counsel

Insights and Developments in the Law **Winter 2018**

Estate Planning Questions for Single Parents

By Jason Smolen and Dan Ruttenberg

In most states, your spouse is first in line to make health and financial decisions if you become incapacitated or die suddenly. But for single parents, the question of who handles these decisions is complicated – who gets custody of your children? Who manages their finances? Who provides them housing and food? Jason Smolen, co-founding principal and estate planning attorney at SmolenPlevy in Vienna, Virginia, says the last thing you want is for a court to decide your children's future. When only one parent is involved, certain aspects of an estate plan demand special attention.

Jason Smolen

Daniel Ruttenberg

Smolen suggests single parents ask five questions:

1. **Have you selected an appropriate guardian?** Have you thought about who would raise your children if you pass away or become incapacitated and you don't have a spouse or partner who could take custody? If the guardian you choose for your children doesn't have the finances to support them, you may want to create a trust to use your wealth to support your children until they come of age. Proper estate planning will ensure that someone you choose will likely take care of your children, instead of a state-appointed guardian.

2. **Are you insured?** As a single parent, you'll only have one income to support yourself, save for your retirement, and secure your children's financial future. Consider life insurance as a resource for your estate to make sure your loved ones are taken care of, in the event of your death. Consider disability insurance to cover your financial needs if you become incapacitated.

3. **What happens if you become incapacitated? (Who takes care of you?)** In your estate plan, it's essential to have an Advance Medical Directive and assign someone you trust to make medical decisions for you if you can't make them yourself. This responsibility could reside with your children if they're old enough, or you could select a relative or close friend you trust. Having the right estate documents will help protect your finances if you become incapacitated by selecting those who will handle your affairs and providing them with instructions.

4. **Have you considered establishing a trust for your children?** A properly structured trust will ensure that your assets end up with your chosen beneficiaries. Consider having your trust managed by a qualified third-party trustee to minimize intra-family conflicts. If you have minor children, a trust enables you to assign when and under what circumstances funds should be distributed to them, so the monies don't come under the control of a court-appointed administrator or former spouse.

5. **Are your estate planning documents up to date?** Remember to update your beneficiary designations regularly, and especially during major life transitions, like divorce, remarriage or the death of a spouse. Make sure it reflects your

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Accolades

SmolenPlevy is pleased to announce Alan Plevy was selected by *Washingtonian* as one of its 2017 "Top Lawyers" in divorce and family law. The award listing is compiled by *Washingtonian's* editorial staff, who complete a comprehensive research process and survey nearly 1,000 attorneys to determine which lawyers should be included on this year's list. The "Top Lawyers" list is published biennially and recognizes an elite group of Washington, D.C.'s legal talent from 20 select practice areas.

Child Support: An Overview

By Alan Plevy and Kyung (Kathryn) Dickerson

As a parent, you may be wondering whether you are entitled to receive or obliged to pay child support payments for your child. The following are a few initial considerations regarding parents' rights to receive child support payments.

Alan Plevy

When married parents divorce or separate, or when only one of the unmarried parents of a child has custody, the court may order the "non-custodial" parent (the parent with whom the child does not live) to pay a certain portion of his or her income as child support. This is not the only scenario in which child support might arise. Less frequently, when neither parent has custody, the court may order them to pay child support to a third party who cares for their child.

No matter what situation gives rise to the need for child support, it might help to think of the legal right to child support as being possessed by a child, for his or her proper care and upbringing, regardless of who actually receives child support payments.

Are You the "Custodial" Parent of a Child?

In order for a parent to get child support, he or she must usually be the "custodial" parent of a child. A "custodial" parent is one who has primary physical custody of a child, meaning that the child, or children, lives primarily with the custodial parent, and that parent is chiefly responsible for day-to-day care of the child. The "custodial" parent can be designated by a court after a divorce or child custody dispute, or can be assumed naturally in single-parent households where only one parent is primarily raising the child.

Child Support in Joint Custody Situations

In cases where a child spends significant time living with both parents (90 days or more in Virginia), they may both be considered "custodial" parents, but one parent may still be required to pay child support to the other. This is especially likely if there is a large disparity in the parents' incomes. For example, if a husband and wife get a divorce and agree to share joint physical custody of their son, the husband would likely be entitled to receive child support from the mother if he were a stay-at-home father during the marriage, while she earned a six-figure salary. Without receiving such financial support, the father would probably not be able to pay the day-to-day expenses required to properly provide care for the child, even on a half-time basis.

Kyung (Kathryn) Dickerson

Amount You Can Receive

Each state has legal guidelines that help establish the amount of child support that presumptively must be paid to the custodial parent. The specifics of each guideline differ from state to state, but they are all generally based on the parents' incomes, work-related childcare, and health insurance for the children alone. Often, the guidelines calculate the amount of child support as a percentage of the paying parent's income that increase with the number of children being supported. If there are good reasons, most states allow some variance from the guidelines.

Child Support Orders

There is a growing misconception that child support should only cover a child's bare necessities, such as food and clothing. In reality, child support is meant to cover a broad range of basic expenses, including shelter, food, clothing, transportation and utilities.

Child support orders are issued by the court, which bases the amount of the support on the state child support guidelines. These guidelines establish the amount of support that must be paid, based largely on the parent's income and the number of children. The court will also take into account other relevant factors, such as the special health or educational needs of the children.

The court can deviate from the guidelines if there are significant reasons for doing so. The fact that the custodial parent has a high income does not itself justify deviation from the guidelines because, under the law, children have the right to benefit from both parents' incomes. Child support can be modified if there is a change in circumstances justifying a modification, such as an increase in the payer's income or the cost of living, a decrease in the custodial parent's income, or an increase in the child's needs.

Contact Us

If you are facing a potential child support issue or dispute, whether due to divorce, separation or as a single parent, we can help by fairly and zealously representing you in child support issues. If you have any questions regarding child support or family law, please contact Alan Plevy at abplevy@smolenplevy.com or Kyung (Kathryn) Dickerson at kndickerson@smolenplevy.com.

International Estate Planning: How to Avoid Tax Traps

Estate planning can be challenging, even for U.S. citizens. But if either you or your spouse — or both — aren't citizens, things can get even more complicated. To avoid tax traps, you'll need to plan ahead.

Citizenship Status

Your estate and gift tax treatment depends on whether you and your spouse are citizens, resident aliens (RAs) or nonresident aliens (NRAs). Residency is based on the concept of domicile. Although the rules are complex, in general, you become domiciled in a place by living there (even if only recently), with the intent to make it your permanent home.

The IRS looks at several factors to determine your domicile, including where you spend most of your time, your community ties, and the locations of family members, residences, business interests and property. If you obtain a green card, you will almost certainly be considered an RA.

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International Estate Planning: How to Avoid Tax Traps

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Why does this matter? Citizens and RAs are subject to U.S. gift and estate taxes on all their worldwide assets and, with the exception of the marital deduction (see below), are entitled to the same exemptions and subject to the same rules. NRAs, on the other hand, are subject to U.S. estate taxes only on certain assets and are liable for gift taxes only on tangible assets located in the United States. But their exemptions are far less generous.

Noncitizens – Watch Out

If you or your spouse is a noncitizen, don't assume that you're entitled to the unlimited marital deduction. A key estate planning tool for married couples, this deduction allows spouses to transfer any amount of property between each other — during life or at death — free of gift or estate taxes while you still have your lifetime exemption.

The unlimited marital deduction isn't available for transfers to a noncitizen spouse (even an RA), unless the property is held in a qualified domestic trust (QDOT). A QDOT incorporates certain protections to ensure that its assets stay in the United States and will eventually be subject to estate taxes. For example, if the noncitizen spouse withdraws any trust principal, it's immediately taxed as part of the grantor's estate. If you don't want to use a QDOT, there are other strategies, such as using a citizen spouse's lifetime exemption (currently $11.2 million) or making annual exclusion gifts. Currently, the annual exclusion for gifts to a noncitizen spouse is $149,000.

Warnings for Nonresidents

NRAs have some advantages over U.S. citizens and RAs: they're subject to U.S. estate taxes only on U.S.-situs assets, such as real estate and tangible personal property located in the United States, stock in U.S. corporations, U.S. bank deposits, U.S. government bonds and certain other intangible assets. Moreover, they're exempt from gift taxes on gifts of intangible assets, wherever they're located. But NRAs also have a major disadvantage: while citizens and RAs enjoy a $11.2 million gift and estate tax exemption, NRAs are allowed an exemption of only $60,000.

For example, Graciela is a Spanish citizen with a net worth of $5 million. She owns a $1.5 million home in California and, although she visits frequently, she isn't a U.S. resident. When she died in 2016, her estate owed $521,800 in U.S. estate taxes. If Graciela were a citizen or RA, her estate tax liability would be zero.

If you're an NRA with U.S. property, one tax minimization strategy is to become a citizen or RA to take advantage of the larger exemption — provided that doing so won't trigger even larger taxes on your non-U.S. property. Another is to own as much wealth as possible in intangible assets and to give those assets to your heirs during your life. There may even be opportunities to convert U.S. tangible assets into intangible assets. For example, you might be able to transfer real estate to a partnership and then make tax-free gifts of partnership interests.

Look for Opportunities

If you or your spouse is a noncitizen, it's essential that you consult Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dhruttenberg@smolenplevy.com. There may be strategies that can save you thousands of dollars in gift and estate taxes.

Cohabitation

Today, a greater number of couples are living together with no intention of marrying. Many couples are living together, buying and selling property together, and going about their lives together as if they enjoy the protections of married couples if their relationship should ever break down. Unfortunately, Virginia does not provide any clear-cut guidelines with regards to the rights of cohabiting, but not married couples. Prenuptial agreements are available for couples who intend to be married and separation agreements for couples who intend to divorce. Cohabitation agreements may be the vehicle of choice for those living without the benefit of matrimony. However, not all states will honor a cohabitation agreement.

Who Should Have One?

There are countless reasons why one or both parties living together should be interested in a cohabitation agreement. The following are some of the most common situations in which it makes sense for unmarried people to consider a written agreement to define their rights and responsibilities in the event of a breakup in their relationship:

- The agreement clarifies the unwed couple's financial positions
- Cohabitation with or without the parties having a joint bank account
- Real estate purchased or held in one person's name, for example, because of the other's bad credit
- The couple is engaged in business together
- One person pays most of the household expenses
- One person is supporting the other through undergraduate, graduate or professional school

What to Include?

Other than titled property, like real estate or bank accounts, Virginia law is generally silent as to the resolution of competing interests or claims if your current relationship should terminate for any reason. Rather, it is up to you and your partner to define what's fair in dividing the assets you've accumulated while living together. Similarly, indebtedness that is jointly titled will have to be litigated if the former partners cannot resolve it. A cohabitation agreement will be interpreted and enforced, according to the ordinary rules of contract law. The courts may enforce executed cohabitation agreements, provided they are used to protect the couple's legal and property interests. Essentially, just about any arrangement that the two of you agree upon will be valid, provided they reflect the free and informed agreement of the parties and contain no illegal terms.

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Cohabitation

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There are many issues, which should be addressed in a cohabitation agreement which include, but are not limited to:

- What will happen to the rights and interests of each party acquired during the non-marital cohabitation if the parties later marry?
- How will property be divided in the event the relationship breaks up?
- What will happen to jointly owned property on the death of one of the cohabitants?
- Will one cohabitant have the right to make medical decisions for the other by means of a health care proxy, if the other becomes ill?
- Who will pay what bills and how much will each contribute for day-to-day living expenses?
- What will happen in the event of the birth of a child to one of the parties?
- Will the parties execute a will with the other as a beneficiary?
- Will the cohabitants make the other a beneficiary under a life insurance policy?

If you're in a close relationship without any concrete plans for marriage, we suggest that you consider contacting Alan Plevy at abplevy@smolenplevy.com or Kyung (Kathryn) Dickerson at kndickerson@smolenplevy.com to discuss cohabitation agreements. It is crucial to protect your legal rights.

Who Should Be the Guardian of Your Minor Children?

If you have minor children, arguably the most important estate planning decision you have to make is choosing a guardian for them, should the unthinkable occur. It's critical to put much thought into this decision to ensure your children will be cared for as you wish in such a situation.

Evaluating Potential Candidates

Here are a few issues to consider when evaluating potential guardians:

- Do they want to serve as guardians?
- Does your estate plan provide sufficient resources so that caring for your children won't cause an economic hardship?
- Do they share your values and parenting philosophy?
- If they're married, is the marriage stable?
- If they have children, do your children get along with them?
- How old are they in relation to the children? A grandparent or other older person may not be the best choice to care for an infant or toddler, for example.
- Are their homes large enough to make room for your children?
- Keep in mind that a court's obligation is to do what's in the best interest of your children.
- The court isn't bound by your guardian appointment, but will generally honor your choice, unless there's a compelling reason not to. It's a good idea to prepare a letter explaining the reasons you believe your appointees are best equipped to care for your children.

Naming Others

It's also important to choose a backup guardian. Why? If your first choice dies or is unable or unwilling to serve for some other reason, a court will appoint a guardian, and you likely wish to provide some guidance on that as well.

Your estate plan should list anyone you wish to prevent from raising your children. Contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dhruttenberg@smolenplevy.com for more information regarding estate planning for parents with minor children.

In the Media

ABC 7 reports on how people are losing their property and more in probate court. They turned to SmolenPlevy's Principal Dan Ruttenberg for tips on how to protect yourself. He advises it's important to know when it's time to consult an estate planning attorney to avoid trouble in probate court later.

For divorced and separated families, the upcoming holidays can be filled with dread instead of joy. SmolenPlevy Principal Alan Plevy gives holiday survival tips to make things easier for parents as well as their children in *Divorce Magazine*.

January is not just the start of another year. It has another, sadder claim to fame: it's the most popular month of the year for divorce. Many married couples considering divorce wait until after the holidays to file because they don't want to ruin family holiday celebrations. SmolenPlevy Principals Kathryn Dickerson and Alan Plevy are mentioned in InsuranceNewsNet's article "January Splits Leave Divorced Couples in Need of Financial Planning."

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current intentions. You don't want a court deciding how your assets are distributed or giving your insurance money to a former spouse.

If you have any questions regarding estate planning, please contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dhruttenberg@smolenplevy.com.