

# Estate Planning for Dysfunctional Families

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## This is where we live and practice

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- 1,135,000 divorces annually in the U. S.\*
- The number of employed psychologists has increased at a 19% annual rate\*
- 300+ parents are killed by their children annually\*\*

\* Source: wolframalpha.com (July 29, 2009).

\*\* Source: "Why Kids Kill Parents" by Kathleen M. Heide, *Psychology Today*, Sep. 1992.

## The Principles of Defensive Estate Planning

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- Learn to Identify Situations Where Defensive Planning is Needed
- Give Family Members a Disincentive to Disrupt the Estate Plan
- Protect the:
  - Surviving Spouse
  - Fiduciary

## Identifying the Need for Defensive Planning

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- Non-Nuclear Families
- Plan Does Not Follow Traditional Surviving Spouse/Then Kids *Per Stirpes* Model
  - Estranged or Disinherited Child
  - Large Charitable Gift
  - Plan is Overly Specific
- Effect of Sibling Rivalry on Fiduciary Appointments

## Non-Nuclear Families

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- *The Brady Bunch* Was a Fairy Tale
- Second Marriages Account For the Vast Majority of Problems
  - There is No “Standard” Way to Handle
  - Texas’s Community Property System Creates Problems
  - Even “Happy” Situations Change When One of The Spouses Dies

## The Road Less Traveled Leads to Problems

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- If the Plan Doesn’t Resemble the Disposition of Property Under the Heirship Statute, Things Can Go Wrong
  - Disinheriting a Child
  - Charitable Giving Calls for Special Measures
  - Controlling From the Grave

## Remember Cain and Abel

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- Death of a Parent Brings Up All Unresolved Emotional Issues
- Adult Siblings Start Acting Like Children Again
- Fiduciary Appointments Can Reveal Old, Unhealed Wounds

## Take the Fun Out of Causing Trouble

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- Well-Conceived Estate Plans Cause Fewer Problems
- Keeping the Pots Right
- Use *In Terrorem* Provisions Sparingly But Effectively
- Execute the Plan Well

## The Principles of a Well-Conceived Estate Plan

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- Understand the Client and The Family
  - Ask
  - Listen
- Control Expectations
  - Client Communication
  - Talk 'Em Down From Crazy Ideas

## The Principles of A Well-Conceived Estate Plan

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- Simple is (Almost) Always Better Than Complicated
  - Just Because You **Can** Do It Doesn't Mean You **Should**
- Remember Whose Bread to Butter
- Walk a Mile in a Fiduciary Litigator's Shoes

## Keeping the Pots Right

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- The Less People Have to Do With Each Other, the Less They Will Fight
- Avoid Making Different People Share the Same Pot
- Cash People Out
- Build in Downside (and Upside?) Protection

## The Terror of *In Terrorem* Provisions

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- Use Sparingly
  - This is *Not* a Boilerplate Provision
- Use Effectively
  - Baiting the Trap
  - Section 64/Section 112.038 Are Now Effective
    - Brought with Probable Cause
    - Brought *and Maintained* in Good Faith
  - Use for Contesting Validity, Not Fiduciary Actions

## Execute the Plan Well

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- This is Why They Pay You the Big Bucks
- Control Everything You Can Control
  - Draft Well (Enough Said)
  - The Signing Ceremony
    - Always the Same. Let Me Repeat: **Always** the Same
  - It is (Almost) Always A Bad Idea to Videotape
- Don't Forget Beneficiary Designations and Multi-Party Accounts

## Protecting the Surviving Spouse

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- Why?
- How?
  - Outright Gifts vs. Gifts in Trust
    - Tax Planning vs. Sensible Planning
  - Third Party Trustees
  - Special Powers of Appointment
    - Use Broad Powers if Possible
    - At the Very Least, Include Charities as Permissible Appointees

## Protecting Fiduciaries

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- Only Appropriate When Family Members are Serving
- Exculpate Up to the Line, But Not Over It
- Relieve Duties
  - The Duty to Diversify
  - The Duty of Impartiality
  - Self-Dealing

## Protecting Fiduciaries

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- Limit the Need to Exercise Discretion
  - All Income vs. HEMS vs. Unitrust vs. Discretionary
- Remember to Keep the Pots Right
  - Avoid Pot Trusts/Spray Provisions
- When Using HEMS
  - Should You Permit, or Require, Consideration of Other Sources of Support?
- Special Powers of Appointment are The Trustee/Beneficiary's Best Friend