



## Lowenstein Sandler's Trusts & Estates Podcast: Splitting Heirs

### Episode 11 - The Sad Tale of Hubby and Lovey: Preparing One's Estate for the Possibility of Divorce

By [Warren K. Racusin](#), Sharon L. Klein

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**Kevin Iredell:** Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://lowenstein.com/podcasts). Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

**Warren Racusin:** I get invited to the 25th wedding anniversary celebration of a couple who I've represented for years. Terrific day, big deal ceremony at a big deal church, big deal reception at a fancy private club. Husband and wife couldn't be happier and everybody has a great time.

Six months later, the couple is in the middle of a rip each other's heads off divorce. Turns out that wife who husband in happier times used to call Lovey. Lovey, when she's at their winter home in Florida, has a friends with benefits arrangement, literally with the pool boy. Husband, a musician travels in Europe for his career where he's found, as we lawyers might say, to be in flagrante delicto with a number of his fellow merry music makers. Years ago, wife's parents created a trust for her and Hubby and Lovey have been living off the income generated by that trust so they wouldn't have to spend their own money. And, mom and dad are worried that son-in-law will try to glom a portion of that trust. Also, husband created a trust for their kids for estate planning purposes a few years ago and Lovey has said she's coming after it as a part of the divorce. Who gets what?

From the law firm Lowenstein Sandler, this is Splitting Heirs. I'm Warren Racusin. We've got a lot to unpack here today. Fortunately, we have a fabulous unpacker here with us ... or unpacktress? I'm not sure there's a female form of the word unpacker, or there's even such a word as the word unpacker, Sharon Klein. Sharon is the president of Family Wealth, Eastern US Region, for Wilmington Trust. Among her many accolades, she is a fellow of the American College of Trust in the state council, as I am, a fellow fellow. Krames Business named Sharon to its 2020 inaugural list of the most notable women in financial advice. And in 2021, she was inducted into the Estate Planning Hall of Fame? Sharon, I didn't know you had that good of fastball. That's very impressive.

**Sharon Klein:** Yeah, right.

**Warren Racusin:** But as folks who listen to our podcast know we always have somebody from Lowenstein on the podcast to talk about the law part of what we're talking about. And then we have an outside guest who kind of looks at what we're talking about through a different focus. But we're going to make an exception today because in addition to being a great wealth advisor in her prior life, Sharon was a trust and estates lawyer at a major New York law firm. So we have Sharon the wealth advisor, Sharon the T&E lawyer, two for the price of one. It's great to have you here today, Sharon. In fact, when I told one of my partners that you were going to be on the podcast, he said, "what? You got Sharon? That's terrific". So we're really happy that there's-

**Sharon Klein:** There's only one place I could go from all that hype. And that's down, Warren.

**Warren Racusin:** Not at all.

**Sharon Klein:** It's about pretty high.

**Warren Racusin:** Also, and not for nothing. You are our second Australian podcast guest.

**Sharon Klein:** Second. Ouch.

**Warren Racusin:** I can say, Aussie is trending on Splitting Heirs. If you want to sing a few bars of Waltzing Matilda, you're more than welcome to do that. Let's dive in. So first, a few fun facts about divorce. In 2021, an estimated 700,000 divorces occurred across the 45 states that report divorce statistics in the United States. During that same year, about 2 million marriages occurred. So that's one divorce for every three marriages in the United States in 2021. Divorce rates in the US have roughly doubled in the last 25 years. As of 2023, about 35% or over one third of my baby boomer generation have filed for divorce. About 44% of first marriages, 60% of second marriages, and 73% of third marriages end in divorce, which proves what one of my divorce lawyer friends always says, which is that remarriage is the triumph of hope over experience.

But when you blend those three together, you get to that sort of common wisdom that 50% of all divorces in this country or 50% of marriages in this country end in divorces. We'll see in a moment that's a little bit oversimplified. Quoting one source, one in three people who divorced in the US are older than 50, my generation, which has led a lot of experts to label this trend as gray divorce. Sharon, do you see that increasingly in your work folks, older folks getting divorced?

**Sharon Klein:** Yes, we do see that. I mean, we see divorce across the spectrum and I will add one more statistic to your list. You said approximately, one out of every two marriages in this country ends in divorce, except in California. They have a different statistic there. Three out of every two marriages ends in divorce.

**Warren Racusin:** Well, there you go. What's interesting is that that notion of 50% of marriages end in divorce is correct. It's a little oversimplified as I said, to some extent that's correlated with certain other demographics. For example, one study by the labor department found that over 50% of marriages of people who don't

complete high school end in divorce compared with about 30% of marriages of college graduates. So while 30% is not insignificant, it's much less than 50%. I haven't seen any data to indicate why that is the case, but it does remind me a little bit of the story of the Plotnick Diamond, you know the story of the Plotnick Diamond, Sharon?

**Sharon Klein:** Remind me, please?

**Warren Racusin:** Man walks into a bar, sits down next to a woman, looks over, and she's wearing a diamond ring and the diamond is a rock. It's a boulder, it's enormous. He says to her, "That's quite a diamond ring." She says, "Yes, this is the Plotnick diamond." He says, "It's incredibly beautiful." She says, "Yes, but it comes with a terrible curse." He says, "What's the curse?" She says, "Mr. Plotnick." Sharon first put your lawyer's hat on, one of these nice folks visit you and ask for advice. What are the first thing you tell him and her when he or she comes into your office and says, I'm getting divorced? What's the first few things that you make sure you talk to this new client about?

**Sharon Klein:** The first thing I would say to a client like that comes into the office is, I would tell them even before analyzing those trusts that you just described, which of course we'll get to, is I would tell them to take a look at their estate planning top documents. Because during times of transition and especially divorce, it's really key to review all of your estate planning documents, your beneficiary designations to make sure that they reflect your current wishes. And this is especially important while divorce is pending because during the whole divorce process, until people actually get divorced, they're married, they may be miserable, they may be wanting to rip each other's heads off, but they're still married and spouses have certain rights and spouses may also feature in documents where they were put in in happier times and that just might not reflect intent anymore. Let's assume here there was no prenuptial agreement.

So we just need to review the overall estate planning and the first document that comes to mind that needs review is a will or a revocable trust. Some people use revocable trust in conjunction with a will as their primary estate planning vehicle. So you need to review the will or the revocable trust for how property passes and also who is nominated in those documents to act as executor and trustee. In other words, are those dispositive provisions and nominations of fiduciaries, are they up to date in light of the pending divorce? It's important not to wait until divorce is final and to focus on it while divorce is pending because it's likely the case in our scenario, Warren, that neither Hubby nor Lovey want their soon to be ex to inherit one more dollar than they have to give them.

**Warren Racusin:** And in most states, like New York and New Jersey and most other states, if their wills as they did in this case, said everything goes to each other at the death of the first spouse, those provisions for each other are automatically revoked once the divorce is finalized. But as you said, so long as they're still married, those are still goodwill. So if they get divorced and Hubby in his excitement about being divorced, trips on his way down the courthouse steps, falls and breaks his neck and dies, Lovey doesn't get anything. But if Hubby is so excited about the prospect of getting divorced that he runs up

the courthouse steps, trips and falls and breaks his neck and dies, Lovey still gets everything because they're not divorced yet. Right?

**Sharon Klein:** That's right. I would just add one caveat, which is that under the laws of virtually every state, including New York and New Jersey, people are required to leave their spouses a certain percentage of their estate. And depending on the state and depending on whether or not someone has children, that percentage is usually a half to a third. So the point is that you're not required to leave more than the statutory amount that your state's law provides unless you've agreed to do so under some kind of marital agreement. And so in the absence of an agreement, ordinarily in most jurisdictions, including New York, including New Jersey, wills can and should be changed during the pendency of a divorce to leave the least amount required to a soon to be ex-spouse.

**Warren Racusin:** Right. And every state's law is different and you need to consult with your advisors to find out what is that smallest amount that you are allowed to leave. So that's... Go ahead.

**Sharon Klein:** Let me just add one thing because everyone likes to hear about celebrity mishaps, right? So there's a case that illustrates the importance of updating documents while divorce is pending. The famous singer, Barry White, who died actually 20 years ago, his estate was \$20 million at that time 20 years ago. And when he died he was separated, but he wasn't yet divorced from his second wife. And it was reported that since he hadn't updated his estate planning documents, his estranged spouse inherited everything because they were still married, they weren't yet divorced, and his longtime girlfriend and their nine children received nothing. So really important.

**Warren Racusin:** This is real world stuff.

**Sharon Klein:** The other really important consideration, as I mentioned, is to look and see whether the people or institutions that you've named to serve as executor or trustee in your wills and revocable trust to see if they're the best choice for the family right now. These are very important roles for administering a person's property, making sure their wishes are effectuated. So particularly when you're in the process of getting divorced, it's really important to make sure that your executor and trustee choices are wise. I mean, Warren, you mentioned like, I work at a trust company and I will say in situations like this, a corporate executor or trustee is often a very good choice because corporate fiduciaries are neutral and independent and can diffuse much of the acrimony like in this Perlman-Cohen case, that can attach to friends or family members acting in that role, especially when you have the acrimony of divorce as a backdrop.

**Warren Racusin:** I couldn't agree more particularly in a situation like that, having a professional trustee can be enormously helpful. So that's the 10,000-foot look at changing your wills. How about other core estate planning documents like powers of attorney?

**Sharon Klein:** Yes, and I'm very glad you raised that because it's really important to update documents like a power of attorney, which allows one person to handle

financial affairs on behalf of another, a healthcare proxy, which allows one person to make medical decisions on behalf of another and also a living will, which evidences an intent not to be kept alive if you're in a vegetative state. And those documents should be reviewed immediately because let's take our Lovey and Hubby scenario. Does either of them want the other to be making important healthcare and financial decisions for them? Probably not. So those documents should be reviewed and modified immediately. So they reflect intent. And I have another celebrity example for you because this really brings it home. When you look at these people in the public eye and they have these missteps, it's a really important lesson for the rest of us. So Warren, you may remember Different Strokes, that famous sitcom and Gary Coleman who started that sitcom.

**Warren Racusin:** Sure.

**Sharon Klein:** He was divorced from his ex-spouse, Shannon Price in 2008, and then in 2010 he sustained a head injury and he was put on life support. He had not updated his healthcare proxy and his ex-wife made critical end of life decisions for him. Was that what he wanted? Maybe not, but that's what he got. So really important to make sure you revisit those documents as well Warren, I should add, titling of assets, which often gets missed because some assets pass outside of a will, right? Then people may update their wills, but assets pass, for example, jointly held property passes outside of a will transfer on death accounts, retirement accounts, life insurance as we mentioned at the outset, you may not be able to change the titling of those assets while divorce is pending, but it's really important again to change what you can as soon as you can and be poised to change the balance as soon as you're able to do that.

**Warren Racusin:** Right. The healthcare proxy is the one that particularly gets people's attention in this, because I always tell people that's the document that says you can pull the plug from the other one. And as Sharon said, do you really want your about-to-be-ex-spouse to have that authority? I know that sounds a little melodramatic, but I'm from New Jersey, the state that gave the world the Sopranos. And so we think in these terms and ways that maybe other people don't. So yes, that's very important. So Sharon, what about these trusts? Let's talk about those a little bit. Tell us about these different kinds of trust and how they play out in situations where there is some wealth involved in a divorce as well.

**Sharon Klein:** Sure. Well, there's actually two types of trust that you described in this scenario. The first trust was the trust for Lovey that was created by her parents. So that's known as a third party trust when someone else creates a trust for your benefit and it's funded with their money. The other trust that's in this SPAC pattern is the trust that Hubby created during the course of their marriage for their children. And so when a trust is created during the course of the marriage, there are certain other considerations that you look to. So let's start by looking at how you analyze in general where the trust assets are vulnerable in divorce, and then let's look at some of the differences in that vulnerability between a third party trust and a trust created by a party to the marriage. So Warren, as you start the analysis to determine in general whether the trust assets are accessible in divorce, the key question is

generally whether the interest of the beneficiary spouse is a property interest, that can be considered an asset under the relevant state law.

And I'm reminded of the old adage as we start our discussion on this topic that when all else fails, read the instructions. Right? Because the first thing you need to do is to look at the terms of the trust agreement. And while much is going to depend on state law as to whether a beneficiary's interest can be considered in a divorce proceeding, the starting point is always going to be to determine the nature of the trust interest. And I'll go straight to the bottom line and then I'll backtrack and take you through the analysis. And the bottom line is that the less chance a trust beneficiary will receive a trust distribution and the less control a trust beneficiary has over trust assets, the less likely that their trust interest is going to be reachable in divorce. As you review the trust document, I have devised what I think are seven key questions to determine if you may be able to access trust assets in divorce.

There's actually an eighth question, but that usually comes up in the context of trust created by parties to the marriage. So we'll hold that one until we get to discuss the trust that Hubby created. So the first question is, who created the trust? We talked about differences between third party trusts and trust created by a spouse, and courts are less likely to consider a trust created by a third party as part of the marital estate. So a trust as in this case that's created by a parent or a grandparent, for example, because that's more likely to have been done as legitimate estate planning as opposed to a spouse creating a trust which may be seen as trying to shelter assets in anticipation of divorce. It just looks more suspicious if a spouse transfers assets to a trust and then says, sorry, they're no longer part of the marital estate.

**Warren Racusin:** So if somebody else creates the trust, if it's somebody else's money rather than the couple's money, it's at least generally speaking less likely that a court is going to let one of the spouses dip into that trust, right?

**Sharon Klein:** Exactly. Correct. Yes. So that's question number one. Question number two is who are the beneficiaries? Because if a trust includes a class of beneficiaries, including multiple people over several generations, particularly if it's a so-called open class of beneficiaries, for example, future issue, so that's a class that can include more beneficiaries as people are born in the future, that leaves the total number of beneficiaries undeterminable. So if that's the situation with a very broad class, it's going to be less likely that the beneficiary spouse will receive a trust distribution as opposed to, for example, the beneficiary spouse being the sole beneficiary. So with a broad class, less likely that the trust interest is going to be reachable in divorce.

**Warren Racusin:** And particularly if the trustee or trustees have the discretion to sprinkle the assets among this class of beneficiaries, which means that this particular beneficiary doesn't have a right to the assets in the trust at all, that's going to be more protective, right?

**Sharon Klein:** Exactly. Correct. You took the next question right out of my mouth. So always one step ahead, Warren.

**Warren Racusin:** My apologies. In fact, there's not yet all legal here. No, I apologize. Not to get all legal, but there's a great named case called Pfannenstiel, that's not the name of the German U-boat commander. It's actually a case that I think stands for pretty much that proposition, right?

**Sharon Klein:** Exactly. Correct. So the third question is on what basis can trustees make distributions? Because remember at the outset I said the key to determining if a trust interest is reachable in divorce is whether it's a property interest. So if a trustee is given very broad authority to make distributions in its sole discretion, the timing and the amount of distributions will be uncertain. So it's just less likely the court is going to find that type of discretionary interest reachable in divorce compared to the situation, for example, if a trustee is required to pay out all of the income.

**Warren Racusin:** So one mistake that Lovey's parents made, if you want to call it a mistake, was naming her as the sole potential beneficiary of this trust because that looks like it's more laser focused on her. The trustees don't have the same discretion to sprinkle assets to other beneficiaries. Maybe the trustees have the discretion not to make distributions at all, but if they wanted to get more protection from a divorce, you would've followed the Pfannenstiel model rather than this model. Right.

**Sharon Klein:** So moving on to question number four, which is, is there a spendthrift provision and a spendthrift clause is commonly inserted by practitioners and trust documents as a form of credit or protection. It basically prohibits a beneficiary from transferring their interest in the trust, it provides that a beneficiary's interest is not subject to that person's debt or liabilities. So the bottom line is that a creditor, and of course an ex-spouse in this situation is the quintessential creditor. The creditor has to wait until a distribution is made to a beneficiary. So in other words, the assets come out of the trust before the creditor can assert any asset, so any claims against those assets. The next question, question number five is does a beneficiary have control powers? And the cases show that the greater the powers of the beneficiary to exert control over a trust, the greater the likelihood that a court is going to consider the beneficiary's interest in a divorce proceeding.

**Warren Racusin:** When you're working on developing a plan, you need not only to keep divorce in mind, but you need to keep in mind that someday this plan will be reviewed and tested, not by a judge who is conversant with trust in the state's law, but by a divorce court judge. And God bless divorce court judges, I got nothing against them at all. But they don't see these kind of situations every day. They don't necessarily understand the nuances as Sharon's explained, of why you would want to keep somebody as a beneficiary having some measure of control from an estate planning point of view, all they're going to see is, oh, Hubby has the right, or Lovey has the right to get some assets out of this trust. That must mean this is part of the marital estate, boom, done, finished.

**Sharon Klein:** All right, moving on to question number six. Is the set law or the creator's intent clear? So under common law principles, under the law, under uniform trust code, which many states have enacted, it's really axiomatic that the set law's intent is paramount. And the set law's intent has often been a key

consideration for the courts, particularly in cases where the set law's expressed intent is that trust assets not be treated as marital property. And of course we saw that in the Pfannenstiel case. Question number seven, who is the trustee? Is the trustee Uncle Joe or the beneficiary's college roommate? Or is the trustee an independent trustee? And if you have a neutral independent trustee acting, particularly a corporate trustee, that usually removes even the appearance of impropriety and can help circumvent suspicion that a family member or a friend acting as trustee is manipulating trust distributions for the benefit of a trust beneficiary.

They're the questions that you asked when you review the trust document. But as we sort of alluded to Warren earlier in our discussion, once you've reviewed the trust document, that's only half the picture, because you have to look at what has actually happened and what does that mean? It means you have to review the history of trust distributions and a court can consider the history of trust distributions to identify any patterns and consider whether the couples have used the trust funds to support their lifestyle, which I think in our scenario that's what you posited. So that would be a bad fact, the Lovey.

**Warren Racusin:** Right. And in all of this, keep in mind, as a practical matter, as you mentioned earlier, Sharon, that it's always possible that you could win on keeping the trust out of the divorce. But a judge could always say, all right, divorcing spouse doesn't get a share of the trust, but the other marital assets that they clearly own, instead of splitting them 50/50, I'm going to split them 60/40 to try to do some rough justice. Right.

**Sharon Klein:** Exactly.

**Warren Racusin:** So even if you win, it may not be an overall winner. It may not be a complete win, but that's how divorce courts work. Well, we've covered a lot of ground here. We have, believe it or not, a lot more ground to cover. And Sharon has, I think, graciously agreed to come back for round two sometime probably next season. And if we haven't scared you away, Sharon, we'd love to dive into some other aspect of this down the road.

**Sharon Klein:** Well this has been great fun. I'd love to come back. Thank you.

**Warren Racusin:** Terrific. Well, thank you Sharon so much. Thank you. Sharon, the wealth advisor. Thank you Sharon, the trust and estates lawyer. Thank you to everybody at Lowenstein who makes these podcasts possible. Thanks mostly to all of you for listening. We really appreciate it. We'll see you next time. Until then, as we say in these parts, have a good one.

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