



# It's Complicated: Estate Planning and Administration for the Modern Family

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# Introduction

# Presenters



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# Agenda

1. Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise
2. Blended Family Challenges
3. The Modern Family and Evolving Definitions
4. Modern Family Multijurisdictional Issues: When Wills and Trusts Cross Borders and How to Navigate Them
5. Gender Identity and Fluidity: Impact on Estate Planning



# 1. Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Estate planning and administration have become more global as families have become more global
- A more nomadic culture: family members can live in several jurisdictions over the course of a year and have assets in each

# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Family members immigrate to different jurisdictions from their country of origin

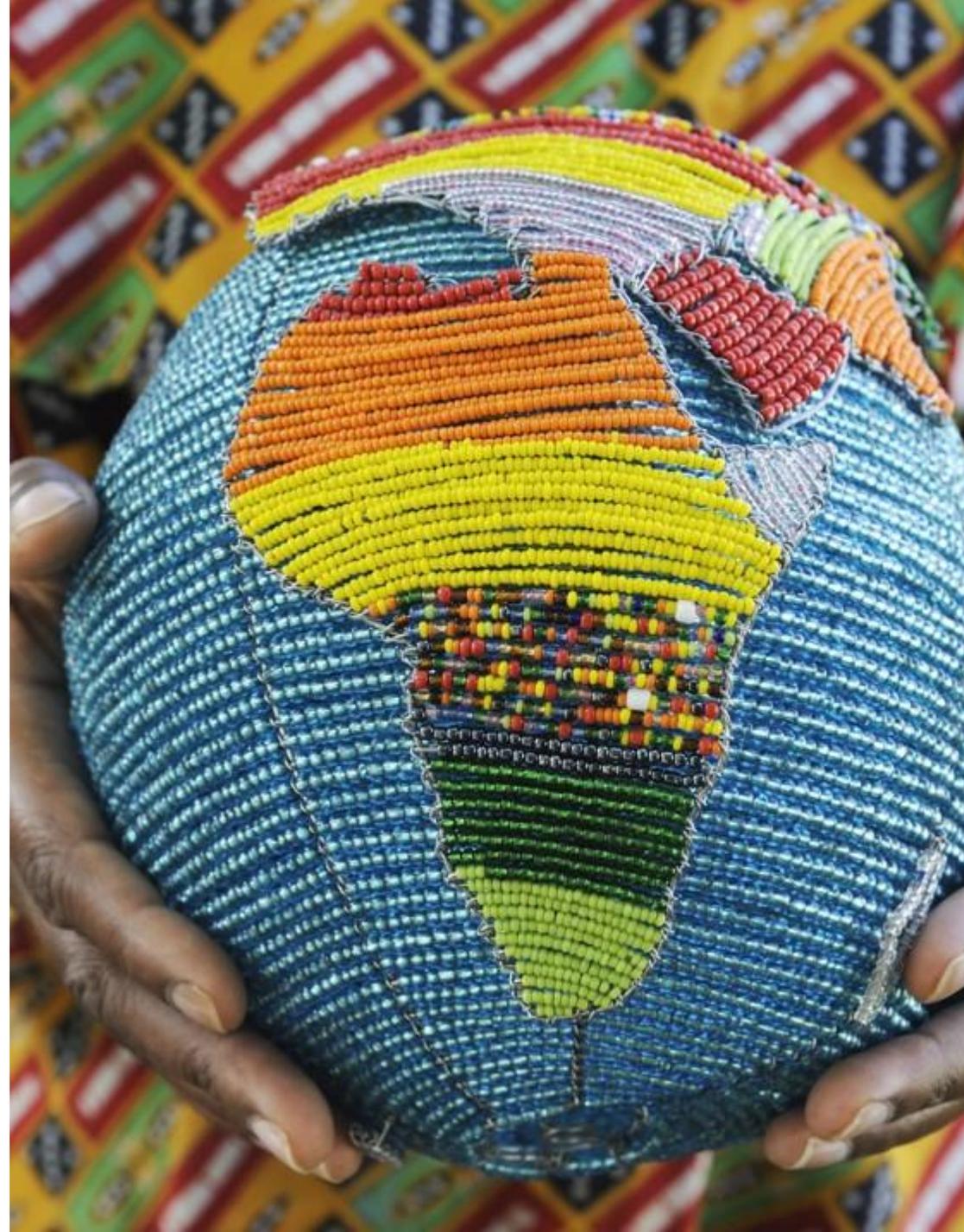


# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Culture intelligence: advisors need to cultivate cultural intelligence
- Understand and successfully interact with families from different cultural backgrounds

# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Learn about different cultures and their values, norms, traditions, similarities and differences
- Adapt to each unique family situation



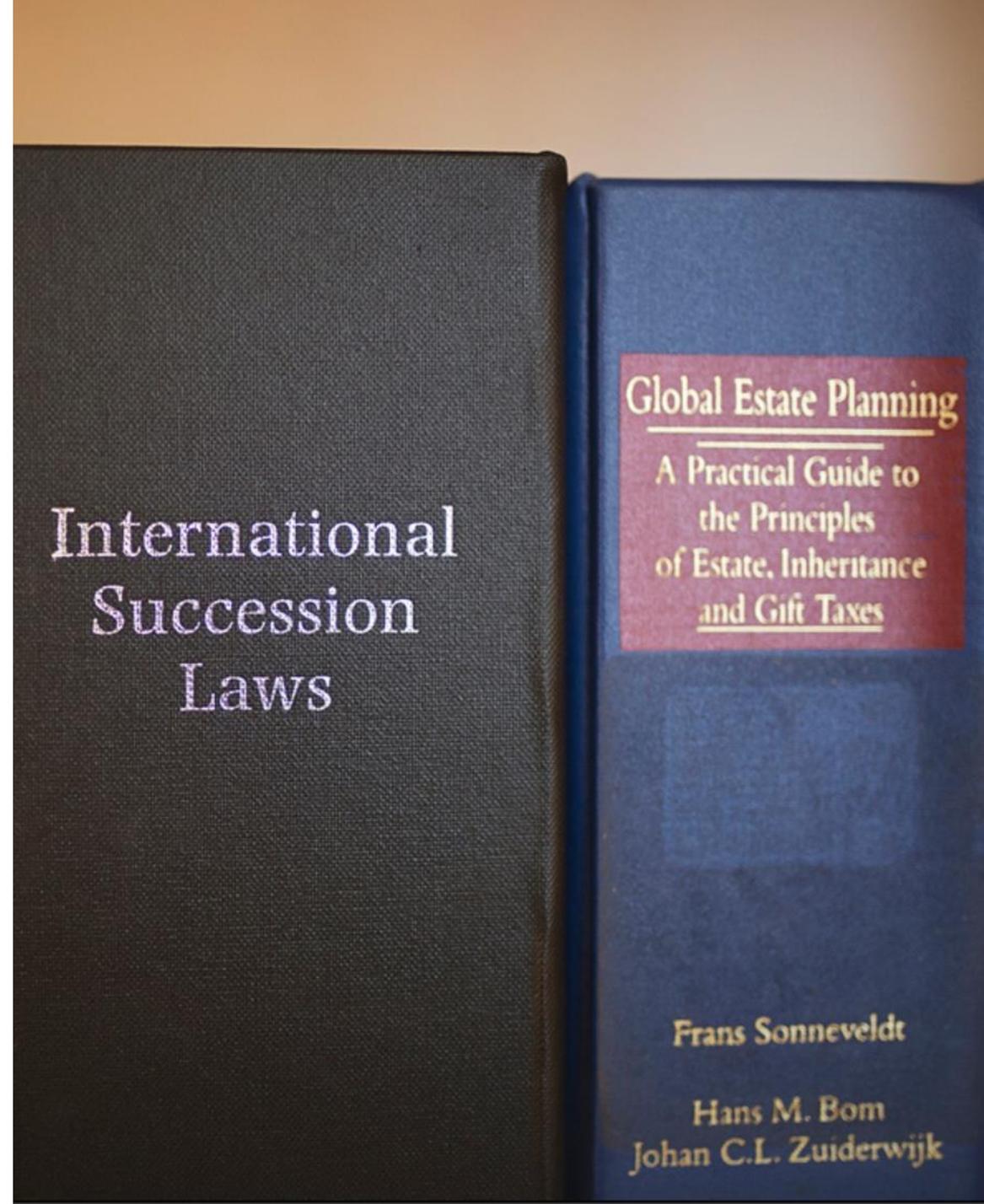
# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Be culturally sensitive and empathetic and understand family structure, rules, and attitudes including on inheritance



# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Multijurisdictional expertise: be competent to advise on tax and legal issues which impact global families



# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Conflict of laws including determining which law will govern succession to property when a family has connections to different jurisdictions



# Globalization of Families and Need for Cultural Intelligence and Multijurisdictional Expertise

- Cross-border legal and tax planning strategies which integrate legal and tax issues for private clients with connections to multiple jurisdictions:
- A growing and unique area of expertise

# POLL QUESTION #1

If you are an advisor, do you think advisors in general are culturally intelligent, and if you are a client, do you think your advisors are in general culturally intelligent? What percentage are culturally intelligent:

1. More than 75%
2. About 50% to 75%
3. About 25% to 50%
4. Less than 25%

## 2. Blended Family Challenges

# Blended Family Challenges

- What is a “Blended Family” vs. a “Non-Blended Family”?
- The importance of making this determination
- The complexity of understanding the blended family’s dynamics: one size does not fit all

modern  
family  
the complete fifth season



# Blended Family Challenges

- Conflicts of interest
- Joint or separate retainers
- Professional rules



# Blended Family Challenges

- How to determine which type of retainer is appropriate
- Warning signs and “red flags”



# Blended Family Challenges

- Strategies for “splitting the pie”
- The importance of quantitative analysis: what is “enough” for a spouse in providing for a surviving spouse and what is “enough” in providing for capital succession to children, including from prior marriage(s)
- Tax considerations and preferential treatment of spouses: achieving the correct balance between a spouse and children of a prior marriage
- Spousal trust vs outright distribution: advantages and disadvantages

# Blended Family Challenges

- Mutual will agreements
  - When should they be used?
  - Are they legally effective?
- Mutual will agreements are not the same as mirror wills



# Blended Family Challenges

- The importance of careful choice of fiduciaries: executors, trustees and attorneys for property and personal care
- The role of independent executors, trustees and attorneys and their roles

# Blended Family Challenges

- Avoiding litigation: ensuring who is to be a beneficiary is included and who is not to be a beneficiary is excluded
- Naming beneficiaries, class gifts, and treatment of step-children and step-grandchildren

# 3. The Modern Family and Evolving Definitions

# The Modern Family and Evolving Definitions

- Who is a “parent” and what is “parenting”
- Modern family Ontario legislation: *All Families are Equal Act* in force from January 1, 2017: promotes equality and inclusion
- Shifts concept of being a parent from just biology to also being based on pre-conception intention

# The Modern Family and Evolving Definitions

- “Parent” can include birth parent (unless a surrogate where special provisions apply)
- A male who conceived a child through sexual intercourse unless he and birth parent agreed in writing to the contrary before child was conceived



# The Modern Family and Evolving Definitions

- Spouse of birth parent where child conceived without spouse's genetic material through assisted reproduction or artificial insemination unless:
  - before conception did not consent to be a parent
  - birth parent is a surrogate
- No longer need to get declaration of parentage for opposite-sex or same-sex married spouses

# The Modern Family and Evolving Definitions

- Up to 4 persons who are parties to a “pre-conception parentage agreement”
- If a court declares the person a parent



# The Modern Family and Evolving Definitions

- Who is a “spouse”?
- Married spouses, unmarried spouses, same-sex spouses, separated or divorced spouses: huge diversity in who is a “spouse” among different jurisdictions and their legal entitlements



# The Modern Family and Evolving Definitions

## Different rights or no rights including:

- property division and support on termination of relationship including death
- rights on an intestacy
- tax legislation



# The Modern Family and Evolving Definitions

## Example in Ontario:

- married spouse: right to property division on marital breakdown or death, to support and rights on an intestacy
- unmarried spouse: if cohabiting more than 3 years in a relationship of some permanence or earlier if a child is born of the relationship: support rights, no division of property on relationship breakdown or death, no intestate rights
- other Canadian jurisdictions: different treatment some more and some less rights for both married and unmarried spouses

# The Modern Family and Evolving Definitions

## Same-sex married spouses:

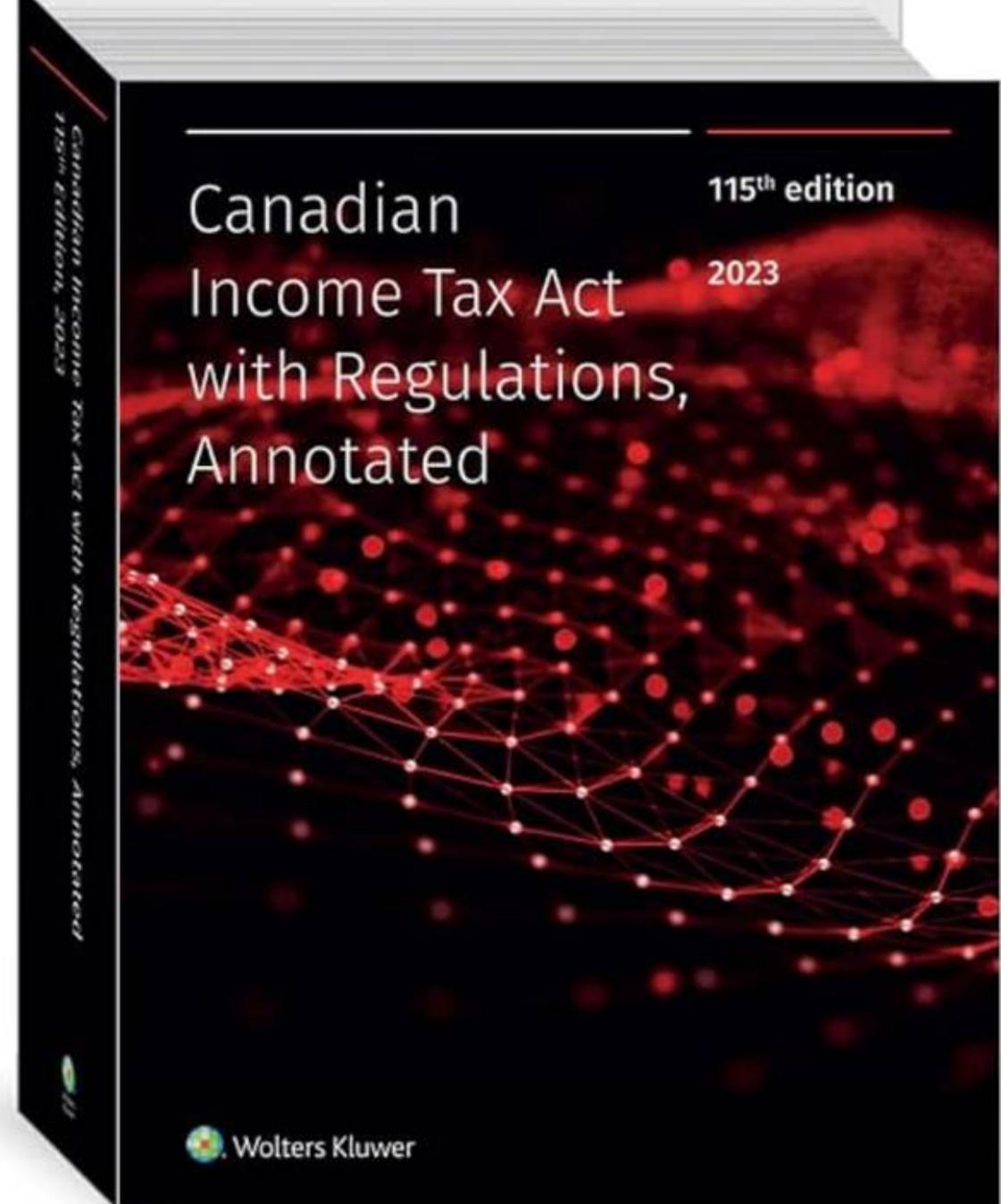
- same sex marriage available in Canada since 2005
- same-sex married spouses have the same rights as opposite-sex spouses

# The Modern Family and Evolving Definitions

## Tax legislation:

Canadian *Income Tax Act*.

- married spouses, and cohabitating spouses after 1 year of cohabitation: same tax treatment
- Some other jurisdictions do not extend this treatment



# The Modern Family and Evolving Definitions

## Who is “issue”?

- very different treatment among different jurisdictions for succession and other purposes
- stepchildren: generally not included if not legally adopted
- children born outside marriage: many jurisdictions do not include them or only recently have changed their legislation to include them
- In Ontario, since 1978, “issue” includes all lineal descendant whether born inside or outside marriage and there is no legal concept of “illegitimate”
- What about a pre-1978 Ontario will or trust: are issue born outside marriage included or not?

# The Modern Family and Evolving Definitions

## Posthumous children:

- many jurisdictions, including in the U.S. and Canada have legislation to include a child conceived and born after a person's death using the deceased person's reproductive material as being their child, including for succession purposes



# The Modern Family and Evolving Definitions

## Ontario:

- legislation includes as “issue” children conceived after and born within 3 years of a person’s death
- various requirements include deceased’s reproductive material is used with their prior written consent and a court order

# The Modern Family and Evolving Definitions

## Recent Alabama Case:

- Embryo considered a “child” under Alabama’s *Wrongful Death of a Minor Act*. what are the implications, if any, for succession purposes?

# CASE STUDY

- Can a trust be “modernized” so its terms are more inclusive?
- Variation of trusts legislation allows a court to approve an arrangement to vary a trust on behalf of minor, unascertained and unborn beneficiaries.

# CASE STUDY

- Court must be satisfied it is for “benefit” of the beneficiaries it represents
- Tension between settlor intent vs. benefit of the beneficiaries: can the court override the wishes of the settlor?

# CASE STUDY

- Jersey court grappled with these issues in *Representation of Y Trust and Z Trust (2017) JRC 100*
- Trusts excluded children born in certain relationships from being beneficiaries which affected children of same-sex relationships and children of unmarried parents

# CASE STUDY

- Family brought court application to vary trusts to include excluded beneficiaries to preserve family unity and harmony
- Court granted the order and held variation of the terms of the trusts would be of benefit to minor, unborn and unascertained beneficiaries

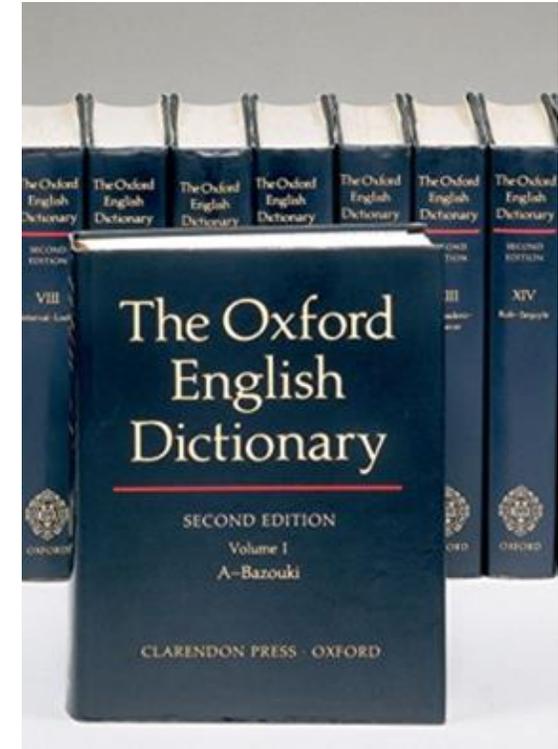
# CASE STUDY

- Court held that if proposed arrangement is beneficial, wishes of the settlor or testator are not a basis to withhold approval in this circumstance
- Court held public policy reasons can influence its approach: benefit to Jersey's trust industry that settlor's wishes are enforced by Jersey courts vs. contemporary public policy reflected in Jersey human rights legislation and in the E.U. which outweigh benefit to the trust industry

**4.  
Modern Family  
Multijurisdictional  
Issues: When Wills  
and Trusts Cross  
Borders and How to  
Navigate Them**

# Modern Family Multijurisdictional Issues: When Wills and Trusts Cross Borders and How to Navigate Them

- Implications of different definitions applicable in jurisdictions in determining who is a beneficiary and is included in a class of beneficiaries.



# Modern Family Multijurisdictional Issues: When Wills and Trusts Cross Borders and How to Navigate Them

## Conflict of law rules

- If no express definitions in the will or trust, need to look at the governing law when the will was signed or the trust created
- Local public policy considerations, forced heirship
- Need for a court order?

# Modern Family Multijurisdictional Issues: When Wills and Trusts Cross Borders and How to Navigate Them

## Intestacy

- Under common law conflict of law rules:
  - the law where real property is situate will govern succession to real property
  - the law of the decedent's domicile will govern succession to personal property

# **5. Gender Identity and Fluidity: Impact on Estate Planning**

# Gender Identity and Fluidity: Impact on Estate Planning

- How will documents prepared today be received by the beneficiaries of tomorrow in light of gender fluidity?
- Legal problems created by using binary terms in determining beneficiaries under a will: example “All of my jewelry to my granddaughters” or “My family bible to my eldest son”

# Gender Identity and Fluidity: Impact on Estate Planning

## Legal problems in the recognition of gender transition:

- if there is a difference in recognition between the law governing the will or trust, where the transgender beneficiary is domiciled or resident, and where the assets are located

# Gender Identity and Fluidity: Impact on Estate Planning

- Practical steps to “degenderize” documents – use of he, she, son, daughter, his, her, brother, sister, etc.



# POLL QUESTION #2

What do you think is most important in dealing with the multitude of issues which impact the modern family:

1. More education on the issues
2. Tolerance and respect
3. Professionals who embrace change and keep current
4. Modernizing the Law
5. None of the above



# Resources:

[Modern Family: Who is a Parent? Who is a Child? It's not Just About Biology Any More](#), October 2023

[Modern family arrangements, multi-jurisdictional presence raising estates complexity, say lawyers](#), October 2023

[Modern Estate Planning for Modern Families](#), November 2022

[Meeting the Needs of Modern Families](#) (Report), STEP.org, November 2021

[All Families are Equal Act](#), January 1, 2017



# Our Blog and Advisories:

Our firm has a blog (twice per month) in which we cover current domestic, cross-border and multijurisdictional trust and estate issues. We strive to be clear, concise and also provocative. Our goal for each post is to provide a few “pearls of wisdom” – easy to comprehend, relevant, and when strung together, an important and valuable collection.

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Yes

No

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# Questions?

To ask our speakers a question,  
type your question into the chat box

# Q&A

# Conclusion

# Thank you for joining us today!



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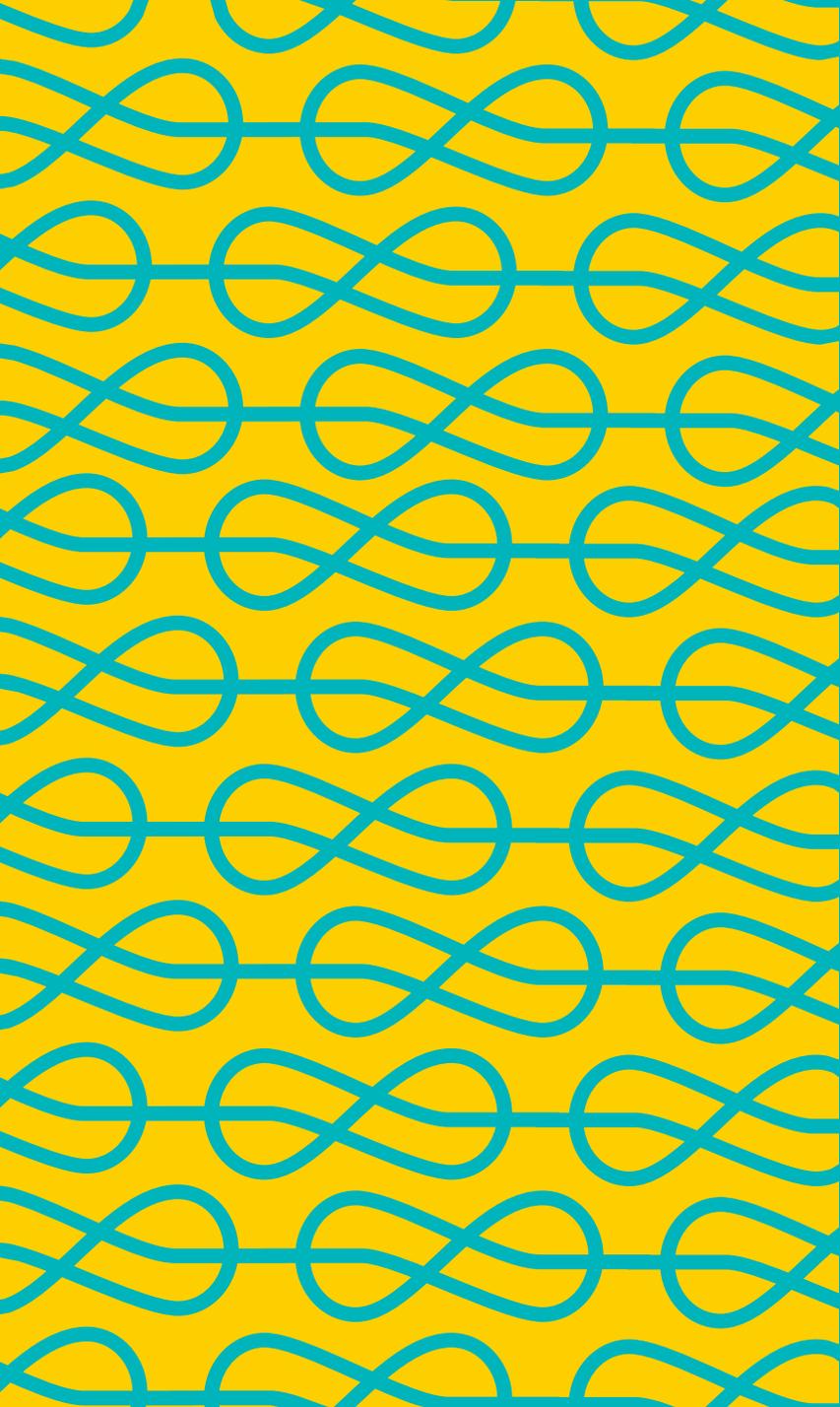
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# Thank you

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