DEFINING DESCENDANTS: BUILDING THE FAMILY YOU WANT

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I. INTRODUCTION

It is easy to grab a form to prepare a document without thinking of each and every term because "we know what is in the form." Usually it is only when we have to explain a term to a client or to a younger attorney that we reflect on the law and the words chosen to define the term. For estate planners, the term "descendants" is easily one of the prime terms that we use every day in our documents. The purpose of this outline is to offer a collection of drafting examples using the term "descendants" (and similar words), while noting key cases and statutes that shape the use of the word. (Though some sections are dated by changes in the statutes, an excellent outline on topic is "Who Are Your Descendants?—Adoption, Half-Bloods, Surrogates, Etc.," by Barbara B. Ferguson, Advanced. Estate Planning and Probate Course, June 1987.)

I want to extend a special note of appreciation to all the attorneys who unselfishly shared their forms and expertise in the preparation of this paper (some of whom are named and others, though not listed, contributed significantly, though silently). This outline is a testimony to the collegiality of the bar (in Texas and in ACTEC). For young attorneys the lesson is make friendships and don't be afraid to ask someone if you need help. For more mature attorneys, please don't forget the times when someone reached down to help you, and pass that favor forward.

As with all educational outlines of this nature, this outline is not legal advice and the reader should not rely on or use the information contained in the outline without independently verifying its accuracy.

II. AS DEFINED

A. In Case Law.

"As a general rule, and when used in its accurate legal sense, the word 'descendant' signifies the issue of the deceased person." *Parrish v. Mills*, 102 S.W. 184, 188 (Tex. Civ. App. 1907) *aff'd*, 101 Tex. 276, 106 S.W. 882 (1908). However, "in popular usage, the word 'descendants' sometimes includes the issue of a living person," not just the issue of a decedent. *In Paschall v. Bank of America, N. A.*, 260 S.W.3d 707, 710 (Tex. App.-Dallas 2008, no pet. h.).

What does issue mean? "The rule seems well established in Texas that the term 'issue' when used in a will, is to be interpreted in its ordinary sense embracing all descendants, especially where there is nothing in the language of the instrument to show that a narrower interpretation was intended." *Atkinson v. Kettler*, 372 S.W.2d 704 (Ct of Civ. App., Dallas 1963).

If the term "descendants" means "issue", why is one word selected over the other? (And why does the word "descendants" seem to be the preferred choice of drafters over "issue")? In Texas, it could be because Professor Johanson says so: "'Descendants' is preferred rather than issue. First, the client may not know the meaning of issue. Second, issue can be both singular and plural." Johanson, M. Stanley, "Will and Trust Drafting: English As A Second Language for Lawyers," 15th Annual Advanced Drafting: Estate Planning and Probate; October 2004, League City, Texas, Chapter 10.

Use of the word "issue" in certain forms might solely be because of repeated practice based on one isolated occurrence, such as the incident related by estate planning attorney William D. (Bill) Paragaman of Austin, Texas:

> A major law firm (*e.g.*, VE or Fulbright) was reviewing and updating its will forms. They noticed that their existing wills all used the term "issue," rather than descendants. They started

> researching why they may have chosen that term in the past, and whether it made a difference. Finally, they connected with a retired partner. He explained that long ago, the firm had a very wealthy, eccentric client who insisted that his will be on one page. Back in those days, they didn't have unlimited font sizes – you took what you got from the typewriter – but they could minimize margins, eliminated anything unnecessary, etc. But after all of that, it was still just over a page. Then someone had the bright idea of substituting "issue" everywhere "descendants" appeared, cutting the characters in half every time it appeared. That did the trick!

Mr. Pargaman doesn't know if the story is true nor remembers the source, but it vividly illustrates two important points in drafting: 1. draft to accomplish the client's goal; and 2. understand why language is used in a form before you use it.

B. In the Probate and Family Codes.

The Texas Probate Code, as amended by Acts 2011, 83rd Leg., eff. Sept. 1, 2011 (referred to herein as the "TPC") does not define "descendants" as a term, but does define the word "child" in §3(g) and has numerous other provisions that include the word descendants in defining those who will take upon the distribution of an estate.

While the Texas Family Code, as amended by Acts 2011, 83rd Leg., eff. Sept. 1, 2011 (referred to herein as the "TFC") establishes parental responsibility, it has also has provisions regarding inheritance, some of which seem inconsistent with the TPC. However, if there is a conflict, the TFC is the controlling code pursuant to §160.002: "If a provision of this chapter conflicts with another provision of this title or another state statute or rule and the conflict cannot be reconciled, this chapter prevails." Again, like the TPC, the word "descendant" is not defined in the TFC but numerous provisions regulate who is deemed the parent of the child.

C. In Black's.

The Black's Online Legal Dictionary, 2nd Edition (the one the client will be using), defines descendant as: "One who is descended from another; a person who proceeds from the body of another, such as a child, grandchild, etc., to the remotest degree. The term is the opposite of 'ascendant.'" The entry further advises the reader (again the client) that the word "[d]escendants is a good term of description in a will, and includes all who proceed from the body of the person named; as grandchildren and great-grandchildren."

D. In Wikipedia.

This internet "primary" resource Wikipedia (as of October 7, 2012) offers numerous potentially more interesting search options (short film, movie, astrological, novel, and punk rock band) in addition to the legal application:

> A **lineal descendant**, in legal usage, refers to a blood relative in the direct line of descent - the children, grandchildren, great-grandchildren, etc. of a person.
>
> Adopted children, for whom adoption statutes create the same rights of heirship as children of the body, come within the meaning of the term "lineal descendants," as used in a statute providing for the non-lapse of a devise where the devisee predeceases the testator but leaves lineal descendants.
>
> Among Native American tribes in the United States, tribal enrollment can be determined by lineal descent, as opposed to a minimum blood quantum. Lineal descent means that anyone directly descended from original tribal enrollees could be eligible for tribal enrollment, regardless of how much Indian blood they have.

E. In the Document.

"A person of sound mind has a perfect legal right to dispose of his property as he wishes,...." *Rothermel v. Duncan,* 369 S.W.2d 917 (Tex. 1963). Testators may give the term "descendants" a different meaning than what it would have meant under applicable rules of descent and distribution. *Schuwirth v. Reutzel,* 219 S.W.2d 739 (Tex. Civ. App. – San Antonio 1949, no writ). Accordingly, understanding the rules of law and how those rules apply to the facts concerning the intended beneficiaries and the client, the attorney can draft a definition of the word "descendants" to mean those persons the client wishes to take under the dispositive document. Additionally, a testamentary instrument can direct how property will not be distributed. See §§3 (ff) and 58(b) of the TPC.

III. RULES YOU NEED TO KEEP IN MIND

Drafting to identify the right person or persons the client intends to benefit does require thought as to the rules that will or might affect the words chosen in the document.

A. Who is the child?

The TPC defines "child" as "including an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include a child who has no presumed father." §3(b) of the TPC. Due to the mandate in the Federal statutes, Texas adopted the Uniform Parentage Act in 2001, the focus of which appears to be to establish the parental, especially the father, relationship and responsibility with the child. Prior versions of §42 of the TPC prohibited a child from inheriting from his father unless the child was born during marriage or otherwise legitimatized by decree or a statement of paternity. Now a child whose parents are not married "has the same rights under the law as a child born to parents who are married to each other." §160.202 of the TFC.

B. Establishing the Relationship

There are provisions in both the TPC and the TFC that define and formally provide how the relationship between the parent and the child is created. The ways a parent/child relationship can be formed are:

a. Biologically – maternity as provided in §42(a) of the TPC and referred to as giving birth in §160.201(a)(1) of the TFC; and paternity as provided in §42 (b) of the TPC "if the child is born under circumstances described by Section 160.201, Family Code," (which includes presumption, acknowledgment, adjudication or under the rules for assisted reproduction), or is adopted by the father.

b. Adoption – either parent as provided in §40 of the TPC and §160.201 (a)(3) and (b)(4) of the TFC; and maternity only as provided in §42(a) of the TPC.

c. Acknowledged – paternity only, as provided in §42(b) of the TPC and §160.201(b)(2) of the TFC.

d. Adjudicated – paternity as provided in §42(b) of the TPC and either parent as provided in §§160.201(a)(2) and (b)(3) and 160.753 of the TFC (as to gestational agreement).

e. Presumption – paternity as provided in §§ 160.201(b)(1) and 160.204 of the TFC (generally in situations when man is in a married relationship with the mother of the child, but also when living in the household with child during the first two years of the child's life and holding child out to be the man's child).

f. Assisted Reproduction – paternity as provided in §160.201(b)(5) and §160.703 of the TFC (for a married man) or §160.7031 of the TFC (for an unmarried man by consent).

g. Gestational Agreement - §160.752(b) of the TFC controls over any other law regarding

a child conceived under a gestational agreement, which the intended parents must be married to each other.

C. Adopted Child

1. Statutes

For purposes of descent and distribution, an adopted child and "its descendants" shall inherit from and through the adoptive parent(s) and such parent(s) kin "the same as if the child were the natural child of such" parent(s). §40 of the TPC. Similarly, the adoptive parent(s) and kin of such parent(s) will inherit from and through the adopted child. The natural parent(s) of the adopted child will not inherit from or through the adopted child. But, unless the child was adopted as an adult as provided in §162.507(c) of the TFC, the child shall inherit from and through his or her natural parent(s). However, the provisions in §40 of the TPC do not "prevent any parent by adoption from disposing of his property by will according to law." *Id.* Further, Section 40 of the TPC "relating to the rights of adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of 'child' which is contained in" the Texas Probate Code. *Id.*

The Family Code in §162.017(b) provides the "adopted child is entitled to inherit from and through the child's adoptive parents as though the child were the biological child of the parents." Nothing is said of the inheritance rights of the adopted child's descendants.

There is a provision regarding the termination of parental rights in §161.206 of the TFC that confirms the adopted child retains the right to inherit from the and through the parent whose parental rights were terminated unless the court otherwise provides. Apparently, for purposes of privacy and protection of the birth and adoptive parents, the courts regularly terminate the inheritance right of a child adopted at birth or a young age.

The adopted child during the natural (former) parent's lifetime is not treated as born to or adopted by the natural parent, but at death the relationship is recognized.

Unless clearly indicated otherwise, the use of the terms "child," "descendant," and "issue," shall include adopted children. §162.017 (c) of the TFC.

2. Cases

a. *Adopted Adult*

In *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687 (1984), the Supreme Court considered whether or not an adopted 26-year-old stepchild qualified as a "descendant" under the terms of the will of his adoptive father's father. The trust created by the adoptive father's will provided the term "'descendants' shall include the children of the person designated, and the issue of such children, and such children and issue shall always include those who are adopted."

The court looked at the statutes of 1966 (year the father of the adoptive father executed his will) and found that the legislative history stated "an adopted child was 'for every purpose, the child of his parent or parents by adoption as fully as though born of them in lawful wedlock.'" *Id.* at 689.

The court determined that the terms "child" or "children" when used in a testamentary instrument ordinarily cover sons and daughters of whatever age. The court found that under the definition of descendants, there was no age distinction between natural and adopted children from a class of beneficiaries. Accordingly, the adopted 26-year-old stepchild qualified as a descendant.

b. *Adopted Adult – Through the Adopted Parents*

In the case of *Armstrong v. Hixon*, 206 S.W.3d 175 (Tex. App.—Corpus Christi 2006, writ denied) the court considered whether or not the adult-adoptee of a collateral relative could

inherit under the terms of a will. The testator, Tom Armstrong died without children and his will directed it to go to the children of his brother. One of Tom's nieces had adopted an adult.

The court construed the will under the laws in effect 1964, the year the will was executed. The court provided statutory language analysis to determine that "for every purpose" did not mean the equivalent of "from and through." The court held that "provided that an individual adopted as an adult was a child of the adopting parents for all purposes and could inherit from them, but the law [in 1964] did not then suggest that the adopted adult could also inherit 'through' the adoptive parents." The court distinguished the matter from *Lehman* because the will in *Lehman* clearly and expressly contained language that descendants would include those who are adopted. Accordingly, the adopted adult was not deemed a beneficiary under the residuary trust of her adopted mother's uncle.

c. *Adopted Adults Not Included*

In re Ray Ellison Grandchildren Trust, 206 S.W.3d 175 (Tex. App—San Antonio 2008, writ denied), after considering the intent of the grantor in 1982 when the trust instrument was written, the court looked at the intestacy statute of 1975 to conclude the grantor did not intend the term descendants to include persons adopted as adults. The court distinguished the matter from *Lehman v. Corpus Christi Nat'l Bank,* because "the will at issue in *Lehman* specifically included adoptees as descendants, with no age distinction between children and adults." Consequently, the adopted children did not qualify as descendants under the terms of the trust.

d. *Descendents of Adopted Child Excluded*

In his Will, testator defined his children by name and his descendants as:

> ...in addition to any definition set forth in Article I, lineal blood descendants of the first, second or any other degree of the ancestor designated; provided, however, such references shall include, with respect to any provision of this Will, descendants who have been conceived at any specific point in time relevant to such provision and who thereafter survive birth; and provided, further, an adopted child and such adopted child's lineal descendants by blood or adoption shall be considered under my Will as lineal blood descendants of the adopting parent or parents and of anyone who is by blood or adoption a lineal ancestor of the adopting parent or of either of the adopting parents.

In re Estate of Tyner, 292 S.W.3d 179 (Tex. App.—Tyler 2009, no pet.).

The court found that within the context of the will, the testator did not intend for the biological child of his predeceased adopted child to be considered a descendant. The court concluded that the testator intended to limit the term descendants to only the children and adopted children of the two children named in the will.

D. Adoption by Estoppel

"Adoption by estoppel is a remedy applied when efforts to adopt are ineffective because of failure to strictly comply with statutory adoption procedures or because, out of neglect or design, an agreement to adopt is not performed." *In re Estate of Charles Eric Whiting, Deceased,* 2011 WL 4825886 (Court of Appeals of Texas, San Antonio 2008). Also see *Heien v. Crabtree,*369 S.W.2d (Tex. 1963). The effect of an adoption by estoppel does not terminate the parental rights of the birth parents and the birth parents cannot inherit from the "adoptive parents" through such child. *Asbeck v. Asbeck,* 362 S.W.2d 891 (Tex. Civ. App. - Texarkana 1962), aff'd 369 S.W.2^{d} 915 (Tex. 1963).

In *Carpenter v. Carpenter,* 2011 WL 5118802 (Tex. App. – Fort Worth. 2011), the trust stated that upon dissolution, its assets would be distributed to the seven beneficiaries named in the trust, or, if any of those people were deceased, "the descendants of such deceased

[beneficiaries], per stirpes." The question here is what the term "descendants" means. The court concluded that the term "descendant" as used in the trust meant "'one who follows in lineage, in direct (not collateral) descent from a person.'" However, "as a matter of law, the term 'descendant' does not include equitably adopted children."

E. Step-children

Section 69 of the TPC provides that if divorce occurs after the making of a will, all provisions and fiduciary appointments to the former spouse and each relative of the former spouse that is not related to the testator shall be deemed to have predeceased the testator unless the will expressly provides otherwise. Prior to the amendment of § 69 of the TPC, only the former spouse was deemed to not to have survived the testator. See *In re Estate of Nash,* 220 S.W.3d 914 (Tex. 2007).

F. Paternity Rights of Embryo

A child was born from a frozen embryo after the parents divorced. The mother argued that the father lost his paternity rights after the divorce because they did not decide what to do with the embryo. The father was named as the father on the birth certificate and signed a statement of paternity. The court held he was entitled to paternity rights. *In re Olivia Grace McGill*, (Tex. Ct. App. 1999). See §160.706 of the TFC regarding divorce before placement of eggs, sperm, or embryos.

G. Parental Status of Deceased Donor

Texas Family Code §160.707 addresses the situation when one spouse dies before placement of eggs, sperm, or embryos, acquired through assisted reproduction. Unless the deceased spouse consented in a record retained by the physician otherwise, the deceased is not the parent of the resulting child from assisted reproduction occurring after death. However, there is no similar provision safeguarding an unmarried man. See §160.7031 of the TFC regarding consent of unmarried man to assisted reproduction.

The 2012 Supreme Court case of *Astrue v. Capato,* concluded that twins born 18 months after the death of their biological father do not qualify for Social Security benefits afforded to children. 566 U.S.___ (S.Ct. 2012). The Court relied on the Florida intestacy law to determine whether or not such twins were the children of the deceased wage earner.

H. Pretermitted Heirs

"[A} child of a testator who, during the lifetime of the testator, or after his death, is born or adopted after the execution of the will of the testator" is a pretermitted child. §67 of the TPC. The statute takes the position the omission was a mistake, and remedies the error. *In re Estate of Hendler*, 316 S.W.3d 703 (Tex. App.- Dallas 2010, no writ). A pretermitted child will take a portion of the testator's estate if such child was not mentioned in the will or otherwise provided for by the testator.

1. <u>One or more children living when will executed</u>.

If the testator has children when the will was executed, and then has a child thereafter:

a. If no provision was made in the will for any of the children, the pretermitted child receives from the testator's estate not given to the other parent of the pretermitted child, what such child would take under §38 of TPC. §67(a)(1)(A) of the TPC.

b. If provision was made in the will for any of the testator's children, the pretermitted child shares equally with the other children. §67(a)(1)(B) of the TPC.

2. <u>No living child when will executed</u>.

If the testator has no children when he executes his will, the pretermitted child takes his intestate share of the estate under §38 of TPC of the testator's estate not given to the other parent of the pretermitted child. §67(a)(2) of the TPC.

3. Other parent is not surviving spouse.

If the pretermitted child's other parent is not the surviving spouse of the testator, the share awarded to the pretermitted child under §67 will not reduce the surviving spouse's portion by more than one-half. §67(e) of the TPC.

4. Providing for Child.

If the pretermitted child receives property or benefit (in testator's will or outside the will), no share is given to such child under § 67 of the TPC. See *Estate of Gorski v. Welch,* 993 S.W.2d 298 (Tex. App. – San Antonio 1999, *writ denied*) and *In re Estate of Hendler, supra.*

5. Avoiding the Pretermitted Child Statute.

Application of § 67 of the TPC can be avoided by inclusion in the definition of children in the will "afterborn and adopted children."

I. Survival

Section 47 of the TPC requires a beneficiary to survive the decedent by 120 hours unless the will, trust, deed, insurance or other form for disposition of property provides otherwise. Unless the will contains "some language dealing explicitly with simultaneous death or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will," a devisee who does not survive the testator by 120 hours is deemed to have predeceased the testator. §47(c) of the TPC.

J. Prior Death of Legatee

Section 68 of the TPC provides for the distribution of a bequest/devise when the beneficiary named in the will fails to survive the testator.

1. Devisee is Descendant.

If a descendant of the testator or a descendant of a testator's parent who is a devisee under a will fails to survive as defined in the anti-lapse provisions of §68(a) of the TPC, the devise passes to the devisee's descendants who survive under §47 of the TPC (120 hours). This statute applies when the descendant/devisee: (a) is deceased at the time the will was executed; (b) fails to survive the testator; or (c) fails to survive the testator by 120 hours in accordance with §47 of the TPC.

2. Non-residuary Devise.

If §68(a) of the TPC does not apply, and a devise/bequest fails for any reason, then such gift becomes a part of the residuary estate. §68(b) of the TPC.

3. Part of Residuary.

Again, if §68(a) of the TPC does not apply, and the residuary estate passes "to two or more persons and the share of one of the residuary devisee's fails for any reason, the residuary devisee's share passes to the other residuary devisees, in proportion to the residuary devisee's interest in the residuary estate." §68(c) of the TPC.

4. No Residuary Beneficiary Survives.

Again, if §68(a) of the TPC does not apply, if all of the residuary devisees "are dead at the time of the execution of the will, fail to survive the testator, or are treated as if they predeceased the testator, the residuary estate passes as if the testator had died intestate." §68(d) of the TPC.

5. Avoiding Application of the Anti-lapse Statute.

The provisions of §68 of the TPC do not apply if the will provides otherwise. "For example, a devise or bequest in the testator's will such as 'to my surviving children' or 'to such of my children as shall survive me' prevents the application of Subsection (a) of this section." §68(e) of the TPC.

In *Lacis v. Lacis,* 355 S.W.3d 727 (Tex. App.-Houston [1st Dist] 2011, writ dism, w.o.j.), the descendants of the testator's deceased children were seeking to have §68(a) of the TPC to apply to a devise under the testator's will, instead of

the devise passing under the residuary clause. In the case the testator ("Uldis") "specifically stated that the residuary estate would include 'all property in which I may have any interest (including lapsed gifts)....'" *Id* at 733. Reversing the trial court, the appellate court concluded:

> Here, Uldis granted specific legacies and devises to his two children in Articles III and V without stating what would occur should they predecease him. Later in the will, in Paragraph 9.3, Uldis stated that his residuary estate was to include "all property in which I may have any interest (including lapsed gifts)...." Given the commonly assigned legal meaning to the term "lapsed," the inclusion of this language indicates that Uldis contemplated that the specific gifts granted in Articles III and V could lapse. The language demonstrates Uldis's intention that should they lapse, the gifts would become part of his residuary estate. Application of the Anti–Lapse Statute would require us to ignore how Uldis expressly defined his residuary estate and presume that he intended for the specific bequests in Articles III and V to pass to his grandchildren should his children predecease him. In light of the express language in Uldis's will, we decline to do so.

Id. at 736.

K. Intestacy - Heirs

The focus of this paper is to draft the instrument to avoid intestacy. The Supreme Court in *Lehman v. Corpus Christi Nat'l Bank, supra,* at p. 689, stated:

> The laws of descent and distribution have no effect on the passing of property under a will, and are of little interpretive help. In fact, one reason a person executes a will is to modify or abrogate the way his property would pass by the laws of intestacy. As a result, construing a will in accordance with the intestacy statutes may actually be intent-defeating.

However, the incorporation of the rules of descent and distribution may be the best way to identify the beneficiaries. Section 38 of the Texas Probate Code identifies the takers of the separate property estate of a person who dies intestate (while § 45 of the TPC addresses community property). Usually, the term "heirs at law" is used to describe the persons to take under a will after all the other specifically named beneficiaries have failed to survive the testator. In the context of the testator, only the testator's spouse, and not the spouse of any descendant, collateral or more remote relatives are included among the heirs. However, if the term is used in relation to another person, such as the "heirs at law of my son", then the son's spouse would be an heir. See *Power v. Landram,* 464 S.W.2d 99 (Tex. 1970).

L. Relatives of Former Spouse

All provisions in a will executed before the dissolution of the testator's marriage "shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides otherwise." §69(b) of the TPC.

M. Illegitimate

"The question really becomes whether or not an illegitimate child is included within the definition of 'children born to his body'. It has been held by the Supreme Court of Texas that the term 'child', or 'issue', or 'children', without more, does not include illegitimate children. *Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43 (1909)." *Tindol v. McCoy*, 535 S.W.2d 745, 751 (Tex. Civ. App.-Corpus Christi 1976, writ ref'd n.r.e).

N. Other Points

There are a number of other key rules to keep in mind.

1. Murder.

If a person murders the decedent, §41(d) of the TPC prevents such person from benefiting from a life insurance policy covering the decedent's life. See §1103.151 of the Texas Insurance Code. As to the other assets of the murdered decedent's estate that the convicted murderer might inherit, a constructive trust will be imposed under equitable principle. However, there is no forfeiture if the death of the decedent was by casualty.

2. Conviction.

A person convicted of a crime other than the murder of the decedent as discussed above, does not lose their inheritance. § 41 (d) of the TPC.

3. Suicide.

"[T]he the estates of those who destroy their own lives shall descend or vest as in the case of natural death." §41 (d) of the TPC.

4. Abandonment or Injury of a Child.

A parent of a child under age 18 years may be disinherited for purpose of the laws of descent and distribution by an order of a probate code finding the parent has:

a. Voluntarily abandoned and failed to support the child for at least 3 years before the child's death;

b. Voluntarily and with knowledge of the pregnancy, abandoned the child's mother during the pregnancy and remained apart from and failed to support the child after birth; and/or

c. Been convicted or placed on community supervision for being criminally responsible for the death or serious injury of a child of specified sections of the Texas Penal Code.

§41(e) of the TPC. Notice there is a distinction made in paragraphs (a) and (b) addressing "the child" compared to paragraph (c) above referring to "a child."

IV. DETERMINING SHARES

Often the definition of descendants in a document includes how the gift to those persons will be distributed. While the division of the gift is not the subject of this paper, some of the drafting examples attached include the distribution scheme. Section 43 of the Texas Probate Code provides a division known as per capita with representation, to be compared to a strict "per stirpes" or by the roots scheme.

V. DRAFTING EXAMPLES

Finally, attached are drafting examples gleaned from attorneys across the country. Authorship is noted unless contributor requested otherwise.

VI. ETHICAL CONSIDERATIONS

[The following material is an excerpt from "Joint Representation is a Revolving Door – Avoid the Crush" by Michael V. Bourland, David P. Dunning and Jeffrey N. Meyers, 21st Annual Entertainment Law Institute, October 20-21, 2011, Austin, TX, Chapter 6.3, pages 6-11, and16-18, which has been reproduced with the permission of the authors. *The numbering from the original article has been preserved so the references will remain intact.*]

I. Introduction/Texas Disciplinary Rules of Professional Conduct

A lawyer practicing in the areas of estate planning and family business planning must be knowledgeable in the laws of taxation, property, and trusts. However, the prudent estate and family business planning lawyer cannot stop there; in addition, he must have a thorough understanding of the rules regulating lawyer conduct.

Rules regulating lawyer conduct arise from several different sources including i) common law (i.e. tort law, fiduciary law, agency law), ii) criminal law, and iii) the rules of evidence. This presentation, however, focuses on the regulation of lawyer conduct under the Texas Disciplinary Rules of Professional Conduct ("TDRPC"). In particular, this presentation discusses certain

rules ("Rules") of the TDRPC that will likely affect the estate and family business planning lawyer. This presentation neither discusses all of the Rules contained in the TDRPC, nor does it address every provision of a particular Rule. Accordingly, a lawyer should refer to the actual text of the TDRPC, including the Comments, for more comprehensive guidance. The TDRPC are found at Title 2, Subtitle G, Appendix A, Article X, Section 9 of the Government Code and became effective as of January 1, 1990.

[**Note**: Occasional references are made to counterpart rules contained in the American Bar Association Model Rules of Professional Conduct (the "ABA Model Rules"). The ABA Model Rules are the blueprint for the TDRPC; however there are some important differences between them.]

The violation of a Rule may subject a lawyer to disciplinary action. In addition, although the Preamble to the TDRPC expressly states that the violation of a Rule does not give rise to a private cause of action against a lawyer or create a presumption that a lawyer has breached a legal duty to a client, a court may look to the TDRPC for guidance in determining whether a lawyer has committed malpractice or otherwise breached a legal duty to a client.

II. Duty of Communication/Rule 1.03

Rule 1.03 imposes a duty of communication on a lawyer. The purpose of the Rule is to ensure that a client has sufficient information to make intelligent decisions regarding the representation. A lawyer's duty of communication under Rule 1.03 has three basic elements: i) to keep the client reasonably informed about the status of the representation; ii) to promptly comply with reasonable client requests for information regarding the representation; and iii) to reasonably explain the legal matter so that the client can make informed decisions regarding the representation.

1. The standard of compliance with all three duties is reasonableness; the lawyer must make a reasonable effort to communicate with the client so that the client may be able to actively participate in the representation and make informed decisions. The question of whether a lawyer has acted reasonably is ordinarily a question of fact. ROBERT P. SCHUWERK & JOHN F. SUTTON, JR., A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 54 (1990).

2. A lawyer should keep in mind four basic principles underlying the communication requirements of Rule 1.03. SCHUWERK at 57-59.

   a. The communication must be truthful.

   b. Explanations given by the lawyer should be in terms that the client can understand. Further, Comment 5 encourages lawyers to make a reasonable attempt to communicate directly with clients who are minors or mentally disabled, in addition to consulting with the client's representative.

   c. The lawyer must give comprehensive advice concerning all possible options - including the potential risks associated with each option.

   d. In the litigation context, the lawyer's duty to communicate does not end with a judgment, but also includes informing a client about appeal matters, including the client's right to appeal and the relative advantages and disadvantages of an appeal.

3. ABA Model Rule 1.4 is the ABA counterpart to Rule 1.03 of the TDRPC.

III. Duty Of Confidentiality/Rule 1.05

Rule 1.05 imposes a duty of confidentiality on a lawyer. Subject to certain exceptions and limitations, this Rule generally prohibits a lawyer from knowingly disclosing or using "confidential information" of a client or former client. The purposes of the Rule are: (a) to encourage people to seek professional legal

counsel for their legal problems and questions by providing assurance that communications with their legal counsel will be kept in strict confidence, and (b) to promote the free exchange of information between the client and the lawyer so that the lawyer is equipped with all of the information necessary to provide effective representation.

1. Confidential information is broadly defined to include: i) "privileged information" - client information protected by the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, Rule 503 of the Texas Rules of Criminal Evidence, and Rule 501 of the Federal Rules of Evidence and ii) "unprivileged information" - all other client information (other than privileged information) acquired by the lawyer during the course of, or by reason of, the representation.

2. Rule 1.05 contains several exceptions whereby a lawyer may (discretionary disclosures) or even must (mandatory disclosures) disclose confidential client information. In particular, a lawyer may disclose confidential information: i) if the client (or former client) consents after consultation; ii) if the lawyer reasonably believes that disclosure is necessary to comply with the law or a court order; iii) to enforce a claim by the lawyer against the client (i.e. claim for attorney's fees for legal services rendered); iv) to establish a defense to a malpractice claim asserted by the client; and v) to prevent the client from committing a crime or fraud. Furthermore, a lawyer must disclose confidential information if such confidential information clearly establishes that a client is likely to engage in criminal/fraudulent conduct that will likely kill or inflict substantial bodily harm on another. [**NOTE:** See Rule 1.05 and the accompanying Comment for additional discretionary and mandatory disclosures]. In the event a lawyer decides to disclose confidential information adverse to the client, the lawyer should only disclose such information as is necessary to accomplish the authorized purpose of the disclosure.

3. ABA Model Rule 1.6 is the ABA counterpart to the TDRPC Rule 1.05.

IV. Duty of Loyalty

The TDRPC impose a duty of loyalty on a lawyer in that it generally prohibits a lawyer from representing conflicting interests. Rules 1.06-1.13 of the TDRPC address various situations involving conflicting interests.

A. Rule 1.06 Conflict of Interest: General Rule

Rule 1.06 is the general conflict of interest rule. It establishes three (3) basic types of conflict situations. First, a conflict exists if the lawyer undertakes to represent opposing parties to the same litigation. Second, a conflict exists if the representation of a client (or prospective client) involves a substantially related matter in which that client's (or prospective client's) interests are materially and directly adverse to the interests of another client of the lawyer. Third, a conflict exists if the representation of a client (or prospective client) reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client or to a third party, or by the lawyer's own interests. A representation involving the first type of conflict described above is never permissible. However a representation involving either the second or third type of conflict described above is permissible but only if: 1) the lawyer reasonably believes that the representation of each client (or prospective client) will not be materially affected AND 2) each affected or potentially affected client (or prospective client) consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved.

1. Comment 15 to Rule 1.06 contemplates conflicts occurring in estate planning and estate administration:

> "Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for

several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved."

2. Comment 13 recognizes that conflicts of interest in the non-litigation context (i.e. estate planning and family business planning) may be difficult to assess. Relevant factors to consider include: a) the length and intimacy of the lawyer-client relationships involved, b) the functions being performed by the lawyer, c) the likelihood that a conflict will actually arise, and d) the probable harm to the client or clients involved if the conflict actually arises. The question is often one of proximity and degree.

3. Comment 6 states that the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. However, common sense may deem such dual representation inadvisable depending upon the extent of competition between the clients.

4. Although not required by Rule 1.06, a prudent lawyer will make sure that a conflict disclosure and a client's consent to the representation are set forth in writing and signed by each of the clients (or prospective clients). *See Rule 1.06/Comment 8.*

5. A conflict that prevents a lawyer from representing a person also prevents every other lawyer at the firm from doing so.

6. ABA Model Rule 1.7 is the ABA counterpart to Rule 1.06 of the TDRPC. Also, ABA Model Rule 1.8 sets forth certain specific rules relating to current client conflicts, and ABA Model Rule 1.18 addresses a lawyer's duties to prospective clients, including avoiding conflicts with prospective clients.

B. Rule 1.07 Conflict of Interest: Intermediary

1. Generally

Rule 1.07 governs a situation in which the lawyer acts as an intermediary by jointly representing multiple clients in the same matter. The intermediary form of representation (or joint representation) is possible where the joint clients have common goals and interests that outweigh potential conflicting interests. The role of the lawyer is to develop these common goals and interests on a mutually advantageous basis—with the end result being that everybody "wins". Examples of this type of joint representation include: assisting multiple persons in the formation of a jointly owned business enterprise, or performing estate planning for a husband and wife.

2. Role of the Lawyer-Intermediary

In acting as an intermediary, the lawyer assumes a special role. Rather than acting in partisan manner, advocating for the interests of one person only, the role of the lawyer-intermediary is to promote the interests of all of the joint clients—with the goal of achieving a resolution that benefits everyone. At the beginning of the intermediation (joint representation), each client should be advised of the lawyer's special role in the intermediation.

3. Intermediation (Joint Representation) Requirements

A lawyer may not undertake an intermediary representation/joint representation unless all of the following conditions are satisfied:

(1) the lawyer consults with each client concerning the implications of the joint representation, including the advantages and risks involved, and the effect on the attorney-client privileges;

(2) the lawyer obtains each client's written consent to the joint representation; and

(3) the lawyer reasonably believes that:

(a) the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests,

(b) each client will be able to make adequately informed decisions in the matter,

(c) there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful, and

(d) the joint representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. *Rule 1.07(a).*

4. Evaluating the Propriety of Intermediation (Joint Representation)

In evaluating whether a particular legal matter is appropriate for a joint representation, a lawyer should remember the following: A lawyer may never represent opposing parties to the same litigation. *Rule 1.06(a).* In addition, a lawyer cannot undertake a joint representation if contested litigation between the parties is reasonably expected or if contentious negotiations are contemplated. *See Rule 1.07/Comment 4.* If definite antagonism already exists between parties, the lawyer should strongly consider declining joint representation because the possibility that the parties' interests can be adjusted by the joint representation is not very good. *See Rule 1.07/Comment 4.* Finally, as discussed below in more detail, the lawyer needs to consider the impact the joint representation will have on confidentiality of information and the attorney client privilege. *See Rule 1.07/Comment 5.* If the lawyer concludes that Rule 1.07 prohibits him from acting as an intermediary in a legal matter, then all of the lawyers in the same firm would also be disqualified. *Rule 1.07(e).*

5. Confidentiality/Attorney-Client Privilege

In a joint representation, there are no secrets. All information obtained by the lawyer from whatever source (third parties, one of the clients, the lawyer's own investigations, etc.) that would help the clients make informed decisions regarding the common legal matter should be disclosed to each of the clients. Moreover, in the event litigation subsequently arises between the clients concerning the common legal matter, the attorney-client privilege will likely not protect any of the communications between the lawyer and any of the clients concerning such legal matter. Before undertaking the joint representation, each of the clients should be advised of the effect that the joint representation will have concerning confidentiality and the attorney-privilege.

6. Ongoing Consultation

In carrying-out the joint representation, the lawyer must regularly consult with each of the clients regarding the decisions to be made and the considerations relevant in making them so that each client can make adequately informed decisions. *Rule 1.07(b).* However, because the lawyer is not advocating for a particular client, each of the clients will have to assume a more active role in the decision making process.

7. Termination of Intermediation (Joint Representation)

A lawyer must withdraw as an intermediary if any of the clients requests or if any of the requirements for serving as an intermediary cease to exist. The withdrawal must be a complete withdrawal, meaning that the lawyer cannot represent any of the clients in the legal matter subject to the joint representation. *Rule 1.07(c).* Furthermore, arguably the lawyer's continued representation of some of the clients would be improper even with the consent of all of the clients involved in the joint representation. The break-down of the joint representation can be disastrous for everyone (i.e. the lawyer and the clients) because the situation has probably deteriorated to the point where each of the clients will need to obtain separate legal counsel and the lawyer who served as the intermediary may face complaints from one or more of the joint clients.

8. See Sample Consent Letter to Joint Representation in the Formation of an Entity and Sample Consent Letter to Joint Representation of Husband and Wife for Estate Planning. [Letter is attached as an Exhibit.]

9. ABA Model Rule 1.7 is the ABA counterpart to Rule 1.07 of the TDRPC.

***

V. Family Representation Matters and Attorney-Client Privilege

The TDRPC apply to all types of representations (i.e. litigation work, transactional work, etc.). However, the Rules are more easily applied in some types of representations than others. Estate and family business planning is one area where a practitioner is likely to struggle with the TDRPC. The notion of a "family lawyer" permeates the fields of estate and family business planning. Often, the "family lawyer" is called upon to represent multiple family members with varying plans, goals and interests. The multiplicity of individuals and goals inherent in family representation gives rise to ethical problems and legal problems in two main areas—confidentiality and conflicting interests.

For many practitioners, the most common type of family representation is the representation of a husband and wife for estate planning. In the context of estate planning for a husband and wife, three basic models of representation have been proposed by commentators and practitioners for addressing confidentiality and conflicting interests concerns -- 1) joint representation (i.e. the open relationship), 2) separate representation (i.e. the closed relationship), and 3) independent representation.

In a joint representation or open relationship, the same lawyer represents the husband and wife jointly. The husband, wife, and lawyer work together as a team to implement a coordinated estate plan. There are no secrets in a joint representation, and any information and communications relevant to the joint representation disclosed to the lawyer by one spouse should be disclosed by the lawyer to the other spouse. Furthermore, in the event litigation subsequently arises between the husband and wife involving such estate planning matters, the attorney-client evidentiary privilege would not apply. See Rule 503(d) of the Texas Rules of Evidence for exceptions to the attorney-client privilege including fraud, claimants through the same deceased client, documents attested to by the lawyer, and joint clients. (**NOTE:** The attorney-client evidentiary privilege would continue to apply, however, to litigation between the husband/wife, on the one hand, and outside third parties on the other hand). A joint representation may discourage both the husband and wife from fully confiding in the lawyer because they know that anything disclosed that is relevant to the joint representation may be disclosed to the other spouse. Nevertheless, the joint representation model is probably the most common form of representation of husband and wife for estate planning purposes.

Like the joint representation model, in a separate representation or closed relationship, the same lawyer represents both the husband and the wife in the estate planning process. However, in a separate representation, the husband and wife

are each regarded as separate and distinct clients of the lawyer. Because the lawyer regards the husband and wife as separate clients, the lawyer must not disclose the confidences of one spouse to the other spouse. This puts the lawyer at risk of being caught in the unenviable position of learning information from one spouse that would be important to the other spouse in formulating his or her estate plan. However, the lawyer would not be permitted to disclose such information to the other spouse because of the duty of confidentiality owing to the disclosing spouse and consequently the attorney-client privilege should apply to such information. It is important to note that there is disagreement among commentators about the propriety of the separate representation model. The practitioner should carefully review applicable rules and regulations before undertaking such representation.

In an independent representation, the husband and wife are each represented by different legal counsel. This form of representation ensures that each spouse has his or her own counsel "looking-out" solely for the interests of that spouse. It further protects the confidentiality and attorney-client privilege of communications between a spouse and his or her lawyer. From the lawyer's perspective, independent representation is the safest form of representation in terms of avoiding conflict and confidentiality issues. A major drawback of this form of representation, however, is that it is more costly and less efficient than the other forms of representation in which only one lawyer is retained.

It is very important that the lawyer discuss each of the forms of representation described above with the husband and wife at the very beginning, along with the advantages and disadvantages of each form, and let the husband and wife select the form of representation that will best suit their needs. In the event the husband and wife select either the joint representation (i.e. open relationship) or separate representation (i.e. closed relationship), the lawyer should obtain their agreement to such representation in writing.

[End of insert from "Joint Representation is a Revolving Door – Avoid the Crush."]

VII. ETHICAL ISSUES WILL ARISE

In deciding on the correct definition of descendants to be used in a couple's estate planning, secrets or long-forgotten truths of one spouse may surface because the lawyer must ask the hard questions regarding the clients' past. Some attorneys make it a practice to interview the spouses separately, and often refusing to interview the second spouse after hearing the issues/concerns during the first spouse interviewed. If the spouses are open with each other about the descendants of each, the attorney can continue with the traditional representation of the couple after explaining and documenting the conflict of interest and waiver of the conflict between the spouses.

With the internet, information once buried in dark paper archives of hospitals, institutions and county halls can be brought to life with the touch of the search button. Current public records are now easier to access than searching bound volumes of entries at the county clerk's office. Social media sites provide avenues of contact not otherwise possible with addresses from a phone book. In the last two decades the internet has connected more than just computers – it has permanently connected lives, events and experiences in real and tangible ways. Some of those connections may not be welcomed. Asking the hard questions regarding potential and known children parented by your client and by the client's descendants (and in some cases, ancestors) is essential to drafting disposition documents to accomplish the group the client wants to benefit and the group the client wants to avoid.

VIII. ARTFUL COMMENTS

In the process of collecting the drafting samples, snippets and quips were offered that don't necessarily fit with a specific section of this paper, but are too good not to pass along. The following quotes offer insight into the practical side of defining "descendants" (and maybe life in general). The sources are not identified, but

none can be attributed to the authors of this paper. Enjoy!

- "If I move from 'legitimate' I'm thinking about tying the descendant through DNA, i.e., no common DNA, no money. And born during normal gestation periods for humans rather than whenever the power fails at the embryo lab."
- "I have no problem with you using the sample as an example, but something tells me we stole it from ____'s or _____'s forms so it would probably be inappropriate to take credit for it. Earlier, messier incarnations were our original work. Attached are a few variations on them we discussed, but were never quite happy with. We really spent a whole lot of time staring at the Family Code to figure out how to get around that issue and I wasn't ever happy with anything we came up with."
- "It was years before I talked the geezers out of the legitimacy requirement. Now we're splitting the baby and specially defining children of men v. children of women."
- "I sincerely don't really know what a voluntary acknowledgment of paternity is. I anticipate reluctant parents who don't really see the point in arguing with a DNA test cooperating with child support obligations and therefore 'voluntarily' acknowledging paternity."
- "Our 'adopted while under 14' approach is a bit different. I once got into a knock down, drag out fight with a Neanderthal old lady client who wanted, and I'm not making this up, 'Pure Bloodlines.' I asked if 'her people' came over on the Mayflower or something. She asked if I was adopted."
- "...frankly, the anti-lapse statutes have taken much of the fun out of will construction matters for me."
- "I have never addressed all of the new 'how to have babies' in my general definitions – I have had two old cases where I had to tailor-draft to include 'children by sperm' but that was before word processing! The biggest single issue is how large is the potential descendant pool? So is it any baby born with any genetic material by anyone for all times sakes or only form a defined group – like only my sperm in my wife or only my eggs in a surrogate described by me – within a defined time."
- "[Expert Attorney] says a child is whatever the Family Code says it is. I think she will be changing that definition after gay marriages become routine and the liberal front moves to elevate their pets to human status."

Exhibit A

ENGAGEMENT/CONSENT LETTER
FIRM LETTERHEAD[1]

Re: Engagement/Consent to Joint Representation of Mr. and Mrs. _____ for Estate Planning

Dear Mr. and Mrs. _____:

We are pleased that you have engaged our firm to represent the two of you in connection with certain estate planning matters **[Describe the estate planning matters the firm is engaged to accomplish]** ("Estate Planning" or "Estate Plan"). Our engagement on this Estate Planning project will terminate upon completion of our Estate Planning work and providing you the required Estate Planning documents.

An attorney has the duty to exercise independent professional judgment on behalf of each client. If an attorney is requested to represent multiple clients in the same matter, the attorney can do so only if the attorney can impartially fulfill this duty for each client and if the attorney obtains the written consent of each client after explaining the possible risks, benefits, and implications involved in the joint representation.

Based upon our initial discussions with the two of you, we have concluded that our firm can impartially represent the two of you in connection with the Estate Planning. However, please be aware that each of you may obtain independent counsel on this matter--now or at any time in the future. In determining whether you should consent to this joint representation, you should carefully consider the following:

1. Role as Joint Legal Counsel

In our joint representation of the two of you on the Estate Planning, we will strive to represent each of you in a professional manner, with our ultimate goal to reach an arrangement regarding the Estate Planning that is mutually advantageous to each of you and is compatible with the interests of each of you. Because we will be representing both of you, in carrying-out this representation, we must consider the interests of each of you--not the interests of any one person. As you are probably aware, one advantage to independent representation for each of you is that your respective legal counsel would be acting solely on your behalf--looking out for your best interests exclusively without regard to the interests of the other person. On the other hand, utilizing independent representation for each of you is generally more costly, more contentious, and more time consuming than utilizing joint representation.

2. Disclosure of Information/Open Relationship.

We believe that our firm cannot effectively represent each of you in the Estate Planning if material information disclosed to us by either of you relating to the Estate Planning must be preserved in confidence without disclosure to the other person (i.e. separate representation or closed relationship). Accordingly, if we are to represent the two of you, it will only be with the express understanding that any material information disclosed to our firm during this engagement, by either of you and which relates to the Estate Planning, shall be disclosed to the other person if knowledge of such information would be

[1] Joint Representation is a Revolving Door – Avoid the Crush -- Chapter 6.3; State Bar of Texas, 21st Annual Entertainment Law Institute

necessary for him or her to make informed decisions regarding the Estate Planning (i.e. joint representation or open relationship).

3. Attorney-Client Privilege

We believe that any information disclosed to our firm by either of you during this joint representation and relating to the Estate Planning will not be protected by the attorney-client privilege in the event of a subsequent legal dispute between the two of you relating to the Estate Planning. Additionally, our firm would not be able to represent either of you in connection with any such legal dispute and each of you would be required to obtain independent legal counsel.

4. Existing/Prior Legal Representation of Husband or Wife.

[Consider including the following paragraph if the attorney or the firm has an existing or prior legal representation of Husband or Wife]

Our firm is currently performing (and/or in the past has performed) certain legal services for _____. However, we do not believe that relationship with _____ will adversely affect, materially and directly, our ability to fairly and impartially represent each of you in the Estate Planning nor will it require use or disclosure of confidential information related to other legal service engagements. However, should we determine, at any time, that a material bias in favor of _____ exists such that our firm cannot fulfill our duties to both of you, then our firm will have to withdraw from this joint representation and will not represent either in this Estate Planning.

5. Future Conflicts.

At this time, there does not appear to be any difference of opinion among you regarding the fundamental terms of the Estate Planning. However, it may turn out that upon further consultation each of you may have differing opinions regarding the terms of the Estate Planning, such as the persons who will be the beneficiaries of your estate or the property such persons will receive. Should we determine that there are material differences (i.e. that are materially and directly adverse to one another) on one or more issues that cannot be resolved amicably or on terms compatible with the mutual best interests of the two of you, then we must at that time withdraw from the joint representation and our firm would not be able to represent either of you in connection with the Estate Planning. If this occurs, we will, if you wish, assist each of you in obtaining new counsel.

6. Legal Fees and Other Charges

Our legal fees and other costs and expenses in connection with the Estate Planning will be billed to you in the following manner. **[Describe the legal fee arrangement in reasonable detail (i.e. hourly, fixed fee, etc.) along with other costs and expenses to be charged]**.

If you are in agreement with the terms and conditions of this engagement, please sign and date this letter where indicated below, and return it to me in the enclosed pre-paid return envelope. Again, we appreciate the opportunity to represent the two of you. If you have any questions about the terms of this engagement, our billing statements or any aspect of our representation, please do not hesitate to call me.

Sincerely,

Attorney

ACKNOWLEDGED AND AGREED:

_____ _____
Date

Mr. _____

_____ _____
Date

Mrs. _____