

# HOLISTIC ESTATE PLANNING AND INTEGRATING MEDIATION IN THE PLANNING PROCESS

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*Editors' Synopsis: This Article discusses holistic estate planning as an alternative to traditional estate planning. Providing a brief background on the development of holistic estate planning, the authors explore the advantages of this alternative method of estate planning, which uses mediation techniques and family dynamics specialists to facilitate the pre-estate planning process. Through the use of two case studies, the authors demonstrate how involving the entire family in the estate planning process can facilitate the transition of assets between generations. Involving the entire family allows parents, children, and estate planning attorneys to create a better estate plan that will transfer not only family assets, but also family values and traditions.*

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## I. INTRODUCTION

Historically, adult children have become actively involved in their parents' estate plans only if the plans were contested after their parents' deaths. This was the case because most parents did not share their plans with their grown children. By not revealing their intentions and plans, parents hoped to protect themselves from their children's potential objections and from potential sibling conflicts over their bequests. Secrecy, however, does not protect children and can lead to estate disputes that sometimes destroy families, as well as the gifts, businesses, or properties the parents have left behind.

Until recently, the only alternative available to resolve these post-death estate battles formally was through litigation. Over the past decade, however, attorneys dealing with trust and will contests have become increasingly familiar with an alternative—the use of mediation.<sup>1</sup> Mediation brings all the surviving family members together to discuss their views openly, clear up misperceptions and misunderstandings, and resolve estate and trust conflicts by building consensus.

Holistic estate planning employs the same collaboration-building strategy as post-death mediations, but the holistic estate planning occurs

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<sup>1</sup> Several commentators have documented the increase in the use of mediation to resolve probate and trust disputes. See Ronald Chester, *Less Law, But More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173 (1999); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601 (2000). Ray Madoff conducted a thorough review of programs established in courts and counties across the country to encourage mediation in probate disputes and concluded that where these programs are in existence, there is considerable enthusiasm for mediation and that “the number of programs will undoubtedly grow over the next decade. . . .” Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697, 725 (2004).

before any conflict over the plans has arisen. In many post-death mediations, mediators discover that most causes of estate contests could have been identified prior to the parents' deaths, but were missed during the planning process. If both heirs and testators are involved actively in planning, the potential benefits far outweigh those available in post-death dispute resolution. Parents still may alter their plans in response to what they learn if they so choose, and involving everyone diminishes the probability of adversarial proceedings that will revolve around the testators' intent.<sup>2</sup>

While holistic estate planning ensures a smoother and more efficient transfer of tangible assets, it has another equally important role to play. Parents often want assurances that their children will feel fairly treated and will be able to work together harmoniously if the plans require cooperation (e.g., when they will co-own a family business or vacation property). Parents may also want assurances that the family will not descend into pettiness as they pass their money and possessions to the next generation and that the problems that have existed in family relationships will be resolved—or at least not exacerbated—during their final years. Although there is no quid pro quo, parents may want some assurances that their children will care for them if they become dependent or incapacitated. Finally, many parents' fundamental concern is that their children will assume as their own the values the parents promoted for a lifetime.

Many estate planners recognize that to be effective, the financial and tax strategies they recommend must be designed in this broader context of personal and family needs. In contrast to the rich resources available for dealing with tax and trust issues, estate planners have fewer techniques readily available to them for identifying and dealing with these “soft-side” issues. Holistic estate planning provides both a valuable theoretical framework and practical methods for estate planners.

The central innovation of holistic estate planning is the full involvement of the adult beneficiaries in conversations with their parents in the early stages of the planning process, which allows the broadest range of concerns to be addressed. The conversations, which may take place during

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<sup>2</sup> This dominance of testator intent in wills law acts as a significant impediment to non-judicial resolutions because not all views can be present at the negotiating table. The person whose ‘will’ is in dispute is dead. In addition, to the extent that people feel they are representing the decedent’s views, they are often particularly unwilling to yield their positions.

Ray D. Madoff, *Lurking In the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 177 (2002).

a family retreat, enable family members to explore the personal, familial, and financial aspects of the anticipated transition. While the final legal documents will not specifically address all these goals and concerns, the process leading up to the creation of the documents results in an estate plan that is better understood by all, more likely to be perceived as fair and acceptable, and less likely to produce hard feelings or legal challenges. Holistic estate planning also helps families understand the values and legacy the parents are leaving behind.

Family meetings, the *sine qua non* of holistic estate planning, complement and expand upon the traditional elements of estate preparation. A holistic approach helps families explore subjective and relationship issues that sometimes go undiscussed by holding meetings with individual family members, meetings with various subsets of the entire family (e.g., parents, siblings, spouses), and meetings with the entire group. The parents' attorney usually introduces family systems specialists with an understanding of estate-related issues into the holistic estate planning process, and the specialists typically conduct these family meetings. The parents' attorney remains the expert on legal and financial matters and may participate in some of the meetings to explain various approaches and answer questions. The parents and their attorney complete the planning process with the benefit of the insights gained from the interviews, meetings, and participation of family systems specialists. The holistic approach allows the attorney to understand the client's needs better and to form a stronger relationship with the client. Above all, it provides clients with an estate plan that satisfies their need to transfer both a financial and familial legacy.

## II. ESTATE PLANNING IN THE 21ST CENTURY

The estate planning field is undergoing inevitable change as the primary client base shifts from people born before the Second World War to those the born after the War. The highly educated baby-boomer generation is better acquainted with social and psychological dynamics than their parents, making them more inclined to use a holistic approach to estate planning, in the same way that they embrace a more holistic approach to medicine.<sup>3</sup>

In medicine, the discovery of micro-organisms over a century ago led to a belief by the medical profession that the etiology of every disease

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<sup>3</sup> Recent studies show that nearly half of all Americans report using some type of alternative or complementary medicine. See Melissa Dittmann, *Alternative Health Care Gains Steam*, MONITOR ON PSYCH., Aug. 2004.

could be tied to a specific virus or bacterium and cured by a frontal attack on the pathogen. The success of that strategy revolutionized the treatment of countless diseases. Over time, however, the limitations of the disease model and the tendency of physicians to focus narrowly on symptoms, immediate causes, and the fastest high-tech cures became apparent.<sup>4</sup>

This narrow focus caused many people to feel that physicians had lost sight of their humanity and wholeness. To resolve the limitations, people gravitated toward more holistic therapies that rendered people whole again, conceptualizing body, mind, and spirit as components of the whole person. Through the lens of holistic medicine, many people and physicians now see the physical body as one facet of the total person.

If physicians are the guardians of our corporal assets, estate planners are the guardians of our financial and familial assets. While estate planners certainly serve their clients well by fulfilling their testamentary interests, they might contribute even more to their clients' welfare by following the lead of physicians who have adopted a broader view of their mandate. Because estate planning involves more than avoiding taxes and transferring assets, a holistic approach to estate planning enables attorneys to focus more effectively on the whole family in material, emotional, and social terms.

Appreciating the major life transition older parents enter as they begin estate planning is easier when viewed in the context of the whole family. The estate planning process is the closest thing our society has to a rite of passage to the final stage of life. Many people who are beginning to deal with their own mortality need assistance preparing for the transfer of their tangible assets upon death. They also may need help in defining the terms of the rest of their own lives and encouragement in taking steps to enhance their personal relationships with the people they love. Parents need to believe they can improve the likelihood that their children will have better—not worse—relationships as a result of their estate plans. By advocating a broader, holistic approach, estate planners may make signifi-

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<sup>4</sup> The extensive public and professional interest in holistic medicine was clearly evidenced by the creation of the National Center for Complementary and Alternative Medicine ("NCCAM") in 1998 at the U.S. National Institutes of Health. The report of a conference sponsored by NCCAM and the Royal College of Physicians in London in January 2001 on the question "Can Alternative Medicine Be Integrated into Mainstream Care?" provides perspectives on the diverse and growing role of holistic medicine. National Center for Complementary and Alternative Medicine, *Report: Can Alternative Medicine Be Integrated into Mainstream Care?*, at <http://nccam.nih.gov/news/pastmeetings/012301/index.htm> (last visited Nov. 12, 2004).

cant contributions to their clients' welfare in all these areas, as well as improve the effectiveness of the financial and legal strategies they recommend.

Holistic estate planning, like holistic medicine, looks beyond the narrow view and sees the full picture of the person's life. The process involves all principal players in planning the transition, including both benefactors and adult beneficiaries. Holistic estate planning uses an expanded definition of wealth that includes intangible personal and family assets, as well as tangible ones.<sup>5</sup>

### III. THE FOCUS FOR HOLISTIC ESTATE PLANNING: FAMILIES WITH ADULT CHILDREN

Most discussions of estate planning focus on parents with young children, possibly because estate planning with them is a much more straightforward process. The goal or concern of young parents is typically quite simple: to protect vulnerable children. Parents usually agree on this priority, and because young children have neither the cognitive ability nor life experience to comprehend estate planning, there is no reason to involve them.

On the other hand, teenage children have the cognitive ability to comprehend some aspects of estate planning and may develop a sense of curiosity about their parents' planning. They also may have a sense of entitlement about an inheritance. Still, involving teenage children in issues related to their parents' assets and property is usually premature. Furthermore, teenage children typically do not have expectations about being involved in their parents' planning because it does not fit in the context of their dependent relationship with their parents, nor are they likely to want to contemplate the loss of their parents.

Adult children in their twenties are in an ambiguous position regarding their parents' estate planning. They are part of what one author referred to as "the postponed generation."<sup>6</sup> Over the past two decades, young people entering their twenties have postponed the responsibilities and autonomy of adulthood. Parents of these children are anxious to see how

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<sup>5</sup> James E. Hughes, Jr. has long asserted that a family's most important assets are its individual members. He was a pioneer in describing the three types of capital that exist in families other than financial capital: human, intellectual and social capital. *See generally* JAMES E. HUGHES, *FAMILY WEALTH: KEEPING IT IN THE FAMILY* (Bloomberg Press 2004).

<sup>6</sup> SUSAN LITWIN, *THE POSTPONED GENERATION: WHY AMERICA'S GROWN-UP KIDS ARE GROWING UP LATER* (1986).

they will fare: Will they take charge of their lives? Will they embody the values of home or of MTV culture? Will they be responsible about money? Will they develop a passion for life or will they flounder? Most adult children in their twenties and thirties are building their identity and establishing themselves in the adult world.

Parents of children at this stage express fear that large sums of money, or even the promise of future inheritances, will make difficult choices for children even more difficult. Visions of more money than they could make on their own can unmotivate some young adults and nudge them down a path toward materialism and consumerism.<sup>7</sup> This is a real fear of many wealthy parents. For example, a daughter contemplating a challenging graduate school program may decide that it is not worth the personal cost once she knows she will inherit money from her parents in five years.

Parents may wish to bring these young adults into the estate planning process, educate them about the responsibilities and opportunities of wealth, and prepare them for their inheritance.<sup>8</sup> While young adult children may not be established enough in their own lives and careers to realize the impact of their parents' decisions fully, they are not too young to begin thinking responsibly about managing an inheritance. Total surprise rarely works to any child's benefit.

Once children mature and are no longer dependent on their parents for material support, the utility of bringing them fully into their parents' estate planning process becomes clear. For parents of children in their thirties, forties, and beyond, estate planning is no longer about ensuring children are adequately fed, clothed, housed, and educated. Usually, grown children are already caring for their own basic needs, as well as those of their own children. In some families, older children may even be taking care of their aging parents. Adult children are cognitively capable of understanding the estate planning process, they may have addressed estate planning issues for themselves and their children, and the prospect of inheriting money is unlikely to deter them from being productive members of society. Their values and careers are usually fairly well established. In some cases, their parents' legacy may have as much emotional significance for them as it does financial impact.

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<sup>7</sup> See generally David Myers, *The Secret to Happiness*, YES!, Summer 2004, at 13-16.

<sup>8</sup> One estate planning attorney pointed out that the last thing parents want is to bestow large sums of money on children with little or no planning. Professionals can assist families with preparing children to deal with an inheritance. Telephone Interview with Douglas K. Freeman, Chairman, IFF Advisors, LLC (June 3, 2004).

For the parents, estate planning at this later stage of life is much more about emotional and personal issues. Older parents with grown children are in a different phase of their lives and face different challenges than when they were younger—perhaps when they made their first estate plans. Erik Erikson, a psychologist whose eight-stage model of human development is perhaps the most widely known and accepted, postulated that older adults are in a stage he termed “Late Adulthood.”<sup>9</sup> During this stage, people strive to experience a sense of integrity and ward off feelings of despair. Late Adulthood is a period of reflecting upon one’s life and one’s role in the scheme of things. Ultimately, Erikson claimed that if older adults achieve a sense of purpose and fulfillment about life and a sense of unity within themselves and with others, they will accept transitions they face, even death, with a sense of integrity. Just as healthy children do not fear life, Erikson said, healthy adults do not fear death.<sup>10</sup>

A successful transfer of the tangible and intangible assets built during a lifetime to the next generation can be a vital source of meaning in this late stage of life. Giving gifts to loved ones should be an occasion of joy and gratitude; if it is not, it can backfire and actually worsen an older person’s sense of integrity and connection. In the worst case, transferring assets can be a destructive family experience. Even the fear that it may be destructive can lead to feelings of despair. No one wants any of those outcomes, but few parents know how to ensure a meaningful asset transfer. What do parents need to say and when? Should they talk about values? How much is right? Who should be involved and how? Should they discuss fears? How does one address the different needs and circumstances of adult children?<sup>11</sup>

Holistic estate planning becomes critical in this context. There are no simple answers for parents with these questions, and without pat answers, some parents convince themselves to put off estate planning. They do not

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<sup>9</sup> Erik Erikson, *Identity and the Life Cycle*, in *PSYCHOLOGICAL ISSUES* (George S. Klein ed., 1959).

<sup>10</sup> *Id.* Elisabeth Kübler-Ross, who works with older patients, suggests that the issues people face as they approach life’s end are a complex mix of physical, psychological, and social factors, all of which need to be addressed for people to accept death. *See generally* ELIZABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969).

<sup>11</sup> Charles Collier wrote that such questions “should be asked and answered before estate planning is even discussed.” He describes questions such as, “What is *really* important to your family?” and, “What should you do to guide and support the life journey of each family member over time?” as the deeper, strategic questions that families need to tackle before the parents address the tactical decisions related to how they will transfer assets. CHARLES W. COLLIER, *WEALTH IN FAMILIES* 1 (2001).

want to deal with the difficult choices or the complex and sometimes irrational feelings of family members. These fears may be legitimate if the parents lack the communication and interpersonal skills needed to face spouses and children confidently on their own. Other parents hide their fears beneath claims that they do not care whether their children fight over the estate after they are gone. Estate attorneys typically hear this bravado from parents, and it is typically a mask, or defense, for feelings of inadequacy about their ability to deal with their children's potentially conflicting opinions. Anxious parents react differently when they understand that when they use a holistic approach, they will have professional assistance to deal with the issues and feelings that arise.

The assumption that parents want their grown children to be physically healthy, psychologically well-adjusted, and to have rewarding, long-lasting relationships is a safe one.<sup>12</sup> It is also safe to assume that parents have certain values they would like to see pass to their children and grandchildren. Beyond those basics, however, it is not safe to make assumptions. Each person, each set of parents, and each family must come to an understanding of what the family's legacy will be, what will be maintained, and what will be discarded.<sup>13</sup> Parents of adult children can increase their confidence about how their children will carry on after they depart by engaging their children in a holistic process of estate planning. By understanding this final stage of life and its implications for parents and their families, advisors can guide their older clients along a new path. They can help parents appreciate the larger task they face when contemplating estate planning and help them manage it successfully.

#### **IV. GOALS AND CHALLENGES IN HOLISTIC PLANNING: MOVING TOWARD A TEAM APPROACH**

Holistic estate planning brings all the adult stakeholders—parents and children—into an open, flexible process that explores their wishes, their most important values, and the family legacy in broad terms.<sup>14</sup> One of the

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<sup>12</sup> Ronald Chester cautions that this benign hypothesis about parents' motives may be too generous and offers as evidence some parents' attempts to control their children's lives through stringent conditions embedded in trust documents. Telephone Interview with C. Ronald Chester, Professor of Law, New England School of Law (Aug. 12, 2004).

<sup>13</sup> Scott Farnsworth, an estate planning attorney and the founder of SunBridge, Inc., developed what he calls a Personal Legacy Declaration—a collection of questions that helps people clarify their life story by noting key experiences, enduring values, and themes that persisted over time.

<sup>14</sup> Family transitions can occur with the full participation of parents and children together,

principal goals of the holistic approach is determining what is truly important to family members as they approach this family transition. For example, some parents may wish to talk about the lessons they have learned in life and the values they wish to leave with their children (i.e., some way to transmit their legacy). Some may wish to make amends with a family member with whom they have disagreed, or reconnect with family members from whom they are estranged. While some people try to accomplish such goals by leaving notes in their wills or by leaving unusually significant gifts, these indirect approaches leave important communications to chance. The testator never knows with certainty whether the beneficiary will get the point.<sup>15</sup>

Another goal of the holistic approach is to examine people's differences so that potential conflicts come out before a plan is created rather than after. Uncovering differences and skillfully dealing with them before finalizing the plan can prevent many problems that may arise after plans take effect. These problems often arise after the death of the benefactors, when it is no longer possible for them to explain themselves, change their minds, or take steps to eliminate or ameliorate problems.<sup>16</sup> Individual meetings with all the adult family members before developing a plan is necessary to achieve this goal. If everyone does not have an opportunity to speak confidentially with a professional before developing a plan, it is difficult to know whether anyone is harboring a hidden agenda or sitting on an explosive resentment.

Parents who have never had open conversations with their grown children may make unwarranted assumptions about their children's

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as in the holistic model, or alternatively, with only the participation of either the parents or the children. Transitions with parental involvement occur when parents engage in discussions with only their advisors and not their children. The children only learn what their parents decided when the parents die. Transitions with only the children occur when parents bow out of the whole process and leave everything—possessions, discussions, negotiations, and decisions—for their children to sort out after they have died. Parents sometimes involve some, but not all, of the children, which is a prescription for resentment and schisms among siblings. One other variation involves minimal engagement on the children's part. This occurs when the parents inform the children, but do not discuss with them, the results of their estate planning.

<sup>15</sup> "Mistakes in life are easily made, but sensitive and aware individuals can rectify these and recover from their adverse effects. However, once a person dies, the ability to rectify mistakes vanishes." Gerald Schneiderman, *Including a Health Professional in Will Drafting Aids Transition*, TR. & EST., Feb. 1997, at 60, 61.

<sup>16</sup> Ray Madoff explained that most will disputes revolve around the issue of testator intent. One mediator described the difficulties of mediating will disputes: "[T]here is a shadow at the table who can't speak and can't inform the discussion." Madoff, *supra* note 2, at 178.

situations and likely reactions to their estate plans. When attorneys have incomplete or erroneous information about testators and potential beneficiaries, estate plans are more likely to be contested and the risk of malpractice claims rises. Estate planning attorneys have been able to accomplish the discussions necessary to avoid these pitfalls in some family situations; but in others, attorneys have felt limited in their ability to work with family members because they have not been truly free to have separate interviews because of conflict-of-interest concerns.

Estate planning attorneys are more likely to hear differing opinions and conflicting needs and interests in separate sessions, but every articulated difference raises the specter of a conflict of interest. To eliminate or minimize the conflict, attorneys may advise clients that the substance of individual discussions will be shared with the other family members. Unfortunately, this legal precaution can have a chilling effect on family members' candor in individual conferences.

The alternative, suggesting that everyone should have his or her own counsel, actually can create problems when none previously existed. Because these situations inherently have the potential to become adversarial, obtaining separate representation increases the probability that the principals will become adversaries. If an attorney suggests separate counsel and people decline, the attorney can ask each family member to sign a consent to joint representation letter.<sup>17</sup> While a consent form may satisfy the attorney's ethical requirements, it may also pique adversarial feelings, stir up suspicions, and even cause someone to postpone or abort the estate planning process.

Holistic estate planning adds family systems professionals with mediation expertise to planning teams as an effective method for stimulating open and productive conversations among family members. In addition to addressing the limitations inherent in the attorney-client relationship, family systems professionals can bring valuable psychological perspectives to the process.

One goal of holistic estate planning is to identify the range of issues that a family needs to address, another goal is to facilitate the productive resolution of those issues. This does not imply that the process will resolve all the family's issues through prolonged therapy. Instead, the process should aim for an efficient, pragmatic resolution of specific estate-related issues. Mediation techniques are invaluable in both raising questions and

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<sup>17</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (1983) (describing the informed consent required when an attorney will represent multiple clients on one matter).

bringing them to a practical resolution. The role of mediation techniques in holistic estate planning is discussed at greater length below.

Together, estate planning attorneys and family systems professionals help families meet complex needs. But this assistance only occurs when the professionals have both a clear understanding of the holistic approach and the ability to work together. Estate planners are in the best position to help parents understand the advantages of holistic estate planning after they have established their relationships with the parents. They can then introduce family systems experts and mediation into the process to conduct the meetings with all of the family members.

#### **V. INTRODUCING HOLISTIC PLANNING INTO A PRACTICE: FAMILY BUSINESS AND REAL PROPERTY CASES**

The introduction of mediation into the estate planning process is a departure from traditional practice. It requires additional effort on the part of the planner and additional expense and time on the part of the client. Recognizing the value of this more complex approach is easiest in families with a family business or significant real property.

The clearest case for applying holistic planning is the family with a business. Planning the transition of a business from one generation to the next requires exploration of management, governance, ownership, and many other issues. The stakes are often high. For the adult children, the stakes can include substantial wealth, maintenance of an ongoing livelihood, and fundamental issues of self-image. The stakes for the parents can include the need for the enterprise's continued health during their lifetimes because it represents a major source of their retirement income. Given the complexity and financial scale of this type of transition, the estate planning client is likely to quickly recognize the need for a more inclusive planning process.

Estates with family businesses (or other assets that heirs will hold collectively) rarely can be planned responsibly without involving the legatees. These situations usually put the children and other heirs or successors in line to become business partners upon the sale or transfer or equity, or upon the execution of the will or trust. Partnerships are demanding relationships, even when voluntary and well-prepared.<sup>18</sup> When parents

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<sup>18</sup> See DAVID GAGE, *THE PARTNERSHIP CHARTER: HOW TO START OUT RIGHT WITH YOUR NEW BUSINESS PARTNERSHIP (OR FIX THE ONE YOU'RE IN)* (2004); see also David Gage & John Gromala, *Not All Business! Mediating the Personality Differences Behind Internal Business Disputes*, GPSOLO, Mar. 2002, at 10 (examining partnership problems arising

make decisions for their adult children about co-ownership or co-management of a family business, the risk of future conflict grows. A holistic approach is imperative with families that own such assets. The inclusion of the heirs in estate planning allows the heirs to decide if, and how, they will work (or own assets) together. Including heirs in the discussion will reduce dramatically the risk of disputes among siblings after their parents' deaths. It also can prevent life-long resentments caused by parents' seemingly autocratic control over their children's lives from the grave.

Estates that include vacation homes or other real property also are prime subjects for holistic estate planning. Here again, potential partnerships and deep sentiments can come into play. Estate planners should include the children when determining their future relationships.

The following case studies illustrate the need for holistic planning when these special classes of assets are involved and demonstrate the utility of incorporating professionals who work for the family as a whole and who can interact freely with all family members. In this situation, the estate planner and client can feel confident that hidden agendas and intra-family differences are thoroughly aired. In each of these case studies, estate planners introduced a holistic approach after traditional planning methods generated considerable costs and little value. Experience demonstrates that a holistic, team approach would have been preferable from the start of each case study.

#### A. Case Study 1: the Imposed Partnership

An estate planner was working with a father whose major asset was a ten million dollar family business. The father owned fifty-five percent and each of his three children owned fifteen percent of the business. Two of the sons helped run the business. The attorney tried to help the father with the business succession in the estate plan, proposing joint representation of both the father and the children if they would all consent to it in writing.

The consent letter warned the parties that information given to the attorney could not, and would not, be kept confidential from the other parties, and if a potentially serious conflict of interest developed between the family members, the firm would stop representing the children without explanation and continue to represent the father and the company. Despite their serious misgivings, the three children signed the agreement and worked with their father and the estate planner.

The family started working on a typical plan that had majority owner-

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from personality differences).

ship going to the two sons who worked in the business and would someday run the business together as partners. Work on this plan resulted in many different drafts that included buy-sell agreements, employment contracts, insurance plans, and gifting strategies. Unfortunately, no one felt that progress had been made or that they were any closer to a workable plan after twelve months of meetings and drafts. Every time the lawyer drafted another plan, one of the family members would decide it was untenable. Each plan generated a new objection that had not been voiced during the discussions leading up to the draft of that plan. Eventually, all work came to a halt.

The essential problem was that family meetings with the estate planner were not designed to evaluate the underlying feasibility of the basic plan. The family never started at square one: They never stepped back to ask themselves what they wanted as individuals, what they wanted as a family, and what really was feasible.

Interestingly, a lawyer retained by one of the sons to review the plan pointed out an inherent shortcoming: the estate plan did not include a management plan to complement the ownership succession plan. This lawyer suggested that the father and two sons work with family business specialists who used mediation methods. They hired a mediation team comprised of a psychologist and a business consultant to work with them in developing a plan for employment, management, and ownership succession.

After meeting with the father and the two sons—jointly and separately—it was clear that neither the children nor the father really understood the legal documents that structured the transition of the business from one generation to the next.<sup>19</sup> Although they all wanted the two sons to take over managing the business once the father retired, they agreed upon little else. The father was enthusiastic and optimistic about the two sons' working together, but the sons were unsure that they could be an effective team.

Mediators helped the father see that by transferring stock in the company to his adult children, he was making them *de facto* business partners—even though they had never said unequivocally that they wanted to be partners or that they could work together well enough to be successful as partners. The mediators convinced all of them that it was in the

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<sup>19</sup> This situation frequently arises in family estate cases. When the first step is the creation of the legal documents, the family members, even if they are successful businesspeople, have marginal comprehension of the true meaning and implications of the provisions.

father's and his children's best interests to have the two sons work on a partnership charter as a way of demonstrating whether or not they would be capable of working as a healthy partner team, and if they could, determining exactly how they would do it.<sup>20</sup>

Working together with the mediators—and without their father—the sons made immediate progress, recognizing just how different it would be for them to work together without their father at the helm. Not surprisingly, one son practically begged his father to join them in the meetings and assist them in the process; that, of course, would have continued the three-way dynamic and defeated the purpose of testing the brothers as a two-man team. With the help of tests and structured exercises, the sons examined their leadership styles, their personal values, their expectations of one another, and the issue of fairness. Though it was an arduous exercise for them, the sons developed reasonably good agreements on how they would handle their differences.

Then, in a pivotal meeting, the sons mutually decided that regardless of how financially advantageous it might be to continue the business, their interpersonal difficulties made it unlikely they would ever enjoy working together or trust one another sufficiently to be partners. They both confessed they knew this was true based on the level of discomfort they experienced as they tackled the specifics of working together. Their father acknowledged that the sons had not worked in concert for years, even though they were the company's key employees. They worked closely with their father, but not much (and certainly not well) with each other.

After this revelation, the father was reintroduced into the meetings, and together, the three explored the possibility of splitting the business into two separate companies, but cash-flow modeling helped demonstrate the infeasibility and impracticality of separating the business into two parts. The three then decided that one of the two brothers would buy the father and the other two brothers out of business over time. With the help of the mediators and the company's accountant, the father and his sons used cash-flow projections to analyze the feasibility of the deal and secure bank financing.

A final document developed in the mediation, a management and

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<sup>20</sup> A partnership charter is a preventive tool for people contemplating becoming partners, or for people who are already partners, who wish to clarify the various aspects of owning joint assets or working together. It is both a process and a product, and it raises eleven topics that must be discussed, negotiated, and committed to writing. The charter process is used in estate situations that necessitate ongoing collaboration and joint decision-making among heirs. See GAGE, *supra* note 18.

ownership transition plan, described the buy-out terms, the deferred compensation plans, the parties' roles, and the timing of events. All the parties, including the son who owned some shares but never worked in the business, signed the non-binding document, then gave it to the father's estate planning attorney who completed drafting the estate plan.

As is typical, the basic incompatibilities between the two sons who worked in the business did not come to light fully during the seven years they worked together (though there were signs). The two brothers, who were allowed to split the profits between themselves every year in December, had a horrendous time with their accountant agreeing on the final numbers. Another sign was that they disliked working together in the company even though they were their father's top two managers. The sons worked as individuals for their father, rather than as teammates or future partners.<sup>21</sup>

In the many meetings with the estate planner, the sons never discussed their basic incompatibilities or their problems working together and dividing profits at the end of the year because they did not feel free to discuss those issues. Like most adult children in similar situations, the sons never got over their belief that the estate planner was primarily their father's representative and did not represent them in any meaningful way. In these situations, mediation conducted by family dynamics specialists can relieve estate planners of the burden of being neutral, when in reality, the planners are asked to function as experienced experts.<sup>22</sup>

This case study illustrates how family business experts with mediation skills can work with an estate planning attorney to ensure that the planner has all the input necessary to create an estate plan that will achieve the client's tangible and intangible goals. The team approach enables the planner and client to handle ethical concerns about meeting with family members who have potentially conflicting interests without sacrificing the advantage of someone hearing everyone's perspectives and ideas.

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<sup>21</sup> This is a common dynamic in family business mediations involving siblings. Typically, parents are oblivious to the problem, and though siblings recognize it, they have little idea about how to change it.

<sup>22</sup> See David Gage & Scott Meza, *Achieving Collaboration Through Mediation*, in THE FAMILY BUSINESS CONFLICT RESOLUTION HANDBOOK 190-93 (Barbara Spector ed., 2003). The authors describe a spectrum of roles that professionals may play when working with family businesses. They describe the steep hill professionals who enter the family system as experts must climb if they want to play a neutral role and, most importantly, if they are to be perceived by family members as neutral.

## B. Case Study 2: Seeing the Whole Picture

This case study illustrates the importance of involving neutral professionals who can hear all sides of a family's issues, so that the family, their regular advisors, and the estate planning attorney have a better chance to develop a plan that will leave the family socially and emotionally intact.

The parents, whom we will call Richard and Judy, had grown children and wisely recognized that it would be in everyone's interest to talk together about their estate planning. The children were quite savvy in the areas of business, law, and finance. The estate attorney recommended that each child have independent counsel because of conflict-of-interest concerns. The legal and financial advisors conferred with one another, conferred with their clients, and circulated numerous proposals regarding real property, a business, and trusts.

During the family meetings about these proposals, Richard and Judy basically were on their own with their children and children's spouses. Each meeting would begin cordially, but before long, someone was yelling while others would grow silent. Weeks, and sometimes months, would go by before they would attempt another meeting.

Some family members spoke between meetings, but rather than help, the conversations only raised suspicions of those not privy to them. As the relationships became increasingly strained, family members accused one another of conniving to gain advantage. Suspicions spread both within and between generations and adversely affected Richard and Judy's relationship. Rifts in two of their children's marriages also worsened.

The proposed plans had technical merit with respect to tax minimization, but were doomed from the start because the family had no discussion about the larger picture of the family's transition—no one knew what was important to the other family members. Some family members later admitted to feeling they were on a runaway train. No one felt in charge, including the parents and their estate planner. The process, constructed to resolve the problem, was certain to perpetuate it because of a structural flaw: Each professional was working with only a few pieces of a much larger puzzle. They were unable to put the pieces together because each had a different impression of the whole picture. The result was that spouses' and siblings' needs and interests were either obscured or couched in terms of dollars. The professionals devoted hours to shaping a plan that would satisfy various family members' dollar demands, only to have someone veto or sabotage the plan, causing everyone to view everyone else as irrational. Richard and Judy wanted to give up and once threatened not to give a dime to anybody.

Eventually, one of the children's attorneys suggested that the family en a two-person family dynamics and mediation team. The team included a psychologist and a lawyer, both of whom had experience working with families, estates, and family businesses. After clarifying what their role would be vis-à-vis all the other professionals, the mediators set up a two-and-a-half-day retreat for the entire family, including spouses and one fiancée.

During the first afternoon and evening, the mediators met with Richard and Judy—together and separately—and likewise with the children and spouses. The next morning, the mediators started by meeting with the entire family, and the family agreed upon the ground rules for the retreat. The mediators asked each family member to address several issues, including their hopes for the family during the process and during the transition between generations. All had an opportunity to speak without interruption about what they hoped could be achieved with the family legacy, as well as the family business and properties. They all shared personal visions for achieving their goals, and the mediators started a master list of the issues. Subsequently, the mediators held individual and subgroup meetings, as well as meetings with the entire family. The list of issues grew, but at the same time, the family began to negotiate the issues. Many issues were a total surprise to some family members.

One hidden agenda the mediators helped to unearth involved the family business run by Richard, with considerable help from his youngest son, Bob. Richard had wanted to recognize Bob's contribution by giving the enterprise to him, but he did not know that Bob hated the business and wanted no part of it. Bob had been afraid to tell his father because of the great sentimental value that he perceived his father had attached to the business. Running the business took too much of Bob's time, to the detriment of his own separate business and his relationships with his wife and children. In a separate session, Richard told the mediators that he was continuing the business only because he believed his son Bob loved it and wanted to inherit it. Richard had lost his emotional ties to the business. The family dynamics caused this one issue to touch each family member in an inexplicable way. When the mediators brought everyone together and facilitated a discussion about the business between Richard and Bob, everyone first held their breath and then released a sigh of relief. The solution became obvious: Richard and his advisors would develop a plan to sell the business.

Some of the other negotiated issues included: what would happen to a summer cottage to which some of the children felt extremely attached and

to which other children felt nothing; how would Richard and Judy handle certain valuable items that one or the other of them had promised to certain children; and how would Richard and Judy account for the considerable money they had given or loaned to some of the children over the years?

The sheer number of family members and advisors in this case study created an unusually complex situation; many estates pose similar challenges to the planner and involve tough decisions for family members regarding their lives, careers, and lifestyles. In these situations, it is critical for the mediators to explore the expectations of various family members and their spouses. In some instances, children's spouses have even higher expectations than the children themselves. Control and succession issues involving real property and family businesses are issues waiting to explode if not properly addressed early on in the process. As this case study illustrates, until these issues are addressed in a safe, structured process, they can derail estate planning.

Though wealthier than most, this family was similar to others in an important way: although reluctant to admit it, most families have secrets—some emotionally charged bits of information to which not everyone is privy or aware. The nature of these secrets and histories makes a family unique. A major advantage of the mediation approach is the confidentiality it provides to people in private meetings with the mediators. These meetings, when conducted by experienced mediators, have the effect of quickly uncovering a family's critical secrets.

The issues confronting families with real estate holdings and vacation properties are similar to those confronting families with businesses—and they confront a growing number of families. Vacation property ownership increased thirteen percent during the 1990s, to nearly four million homes.<sup>23</sup> Currently, “[O]ne out of every seven homeowners over age 65 also owns a second home that must be factored into their estates.”<sup>24</sup>

Parents who wish to pass property assets to their children are essentially making their children “instant partners,” just like those parents passing on a business.<sup>25</sup> After receiving these types of assets, children

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<sup>23</sup> Jeffrey Zaslow, “*Mom Always Liked You Best; Who Gets the Beach House?*,” WALL ST. J., Aug. 15, 2002, at D1.

<sup>24</sup> *Id.*

<sup>25</sup> They might also be considered “accidental” or “involuntary” partners. Siblings receive no training for working as partners, which is why they need to thoroughly discuss, negotiate, and agree ahead of time on how they will work together.

must make both short- and long-term decisions together.<sup>26</sup> They will be tied to each other financially in ways that are difficult to unwind. Sharing real property assets adds a level of complexity to children's relationships far beyond that which they would have had if they did not share property.

Parents with vacation properties commonly imagine that all their children will want to continue owning the property. This, however, is rarely the case, and even when it is, there is often a naïveté about the ease with which siblings can share and manage the properties.

Parents may benefit from their estate planning attorneys' helping them see the advantages of first talking with their grown children about the property transfer and then having the children jointly develop a partnership charter. The charter serves as a detailed guide for operating the partnership and includes provisions about how the ownership of the property could change.

## VI. ADDITIONAL APPLICATIONS OF HOLISTIC ESTATE PLANNING

Holistic estate planning is critical for families with businesses or real estate holdings that require inheritors to co-own or co-manage assets, but the planning is also useful in other family circumstances. For example, just as an aging mother and a lone daughter can benefit immensely from some relatively simple asset transfer strategies, they can benefit also from just one meeting with a family dynamics expert who can help them review the significance of the family transition, share personal information they have not discussed, and clear up possible misunderstandings.

One simple family situation involved an eighty-seven year-old mother and her daughter, a sixty-two year-old divorced high school teacher with two teenagers, who struggled to make ends meet and had very little in retirement savings. The daughter vacillated between the fear that her mother had no money left and the fear that her mother had a considerable fortune but was not planning to leave a cent to her or her children. The daughter was a competent woman, but like so many adult children, she believed her mother would consider her greedy for asking about her money and what she intended to do with it. The daughter did inherit all of her mother's half-million dollar estate, but only after suffering through significant and needless emotional turmoil during the years she was kept

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<sup>26</sup> See Olivia Boyce-Abel, *When to Use Facilitation or Mediation in Estates and Wealth Transfer Planning*, FAM. OFF. EXCHANGE (Family Office Exchange, LLC, Chi., Ill.), 4th Quarter 1998, at 5.

in the dark before her mother's death. The story illustrates the advantage of having a simple informational meeting between a parent and child.

Holistic estate planning is imperative in family situations in which the potential for conflict is high. In addition to the overall value of the estate, other financial issues that can complicate estate planning include: economic disparity among heirs, inherited or other separate property, and oral promises that certain assets will go to certain people. Family circumstances such as children with mental, emotional, or physical challenges; poor parent-child or sibling relationships; educational and income disparities among heirs; divorces and multiple marriages; different ideas and desires about philanthropic endeavors; indecisive or dogmatic testators; and circumstances in which some children disproportionately care for parents also can complicate estate planning.

None of these issues is straightforward because it is impossible to know what people think about a situation without thorough interviews. For example, a son who provided years of care for a sick mother may expect a larger share of the estate. Alternatively, he may believe he had benefitted already in some intrinsic way and would not expect, wish, or feel entitled to any inheritance above that which his siblings receive. The mother may wish to recognize and reward the son's assistance, or she may view the years of help as a way of balancing the years of special attention she gave that son earlier in his life. A sister may believe her brother is entitled to special recognition, or she may believe her brother did no more than she would have done if the circumstances had been reversed.

Giving parents examples of how easily family circumstances and dynamics can complicate the planning and execution of an estate can help parents appreciate the need to address the nontechnical, human side of the family transition before they try to tackle a specific plan. A widowed mother in her late seventies with one daughter and one son decided to leave her one million-dollar estate to her daughter because of the wide disparity in the siblings' net worths. She did not tell either one of them for fear that the son would be angry, and as it turned out, she was right. The son was speechless when he found out after the funeral. He claimed his anger resulted from the fact that his mother and sister were plotting behind his back, and he assumed his sister had talked his mother into the plan. He said the money was insignificant to him and that he would have been happy for his sister to have their mother's money if only he had been consulted.

Now, over a decade later, he speaks to his sister only when necessary, and their children rarely see one another. The son's memories of his

mother are tainted by the memory of being cut out of her life at the very end. The ultimate insult, the son said, was feeling trusted and respected by his mother for years, and then being furtively cut out.

A potential conflict between the mother and son became an actual conflict between the brother and sister—one that, so far, has been irreconcilable. Even if the brother would not have liked his mother's idea of leaving her money to his sister, the family's experience most likely would have been healthier if a family dynamics expert had encouraged and assisted the mother in discussing her intentions with her children when drafting the will.

Another circumstance that begs for family dialogue is elevating one or more of their children over others through their estate plan, for example, making one child a trustee, or appointing one to be the executor of the will and giving that child information that the others do not have. These choices, while perfectly logical and straightforward to the parents, may inadvertently alter or destroy what were reasonably healthy relationships. Choosing one sibling to manage indefinitely another's inheritance, or designating co-trustee siblings to make financial decisions for other siblings who may not trust them can create problems. These situations are ripe for misunderstanding and resentment, and they may potentially alter family dynamics in unpredictable and detrimental ways.

## VII. INTRODUCING PARENTS TO A HOLISTIC APPROACH

Estate planners have the opportunity to influence the kind of planning their clients will pursue. Many prospective clients have only vague expectations about the process they are initiating. Even among clients who have some experience with estate planning, most need guidance on the personal as well as the technical side of the process from their attorney. The initial interview between client and attorney is a critical time for defining the client's understanding, expectations, and wishes for the process ahead. The attorney's questions and recommendations at this first meeting can orient parents with grown children to the approach that will serve them best.

Traditionally, the early stages of estate planning consist of the planner's information gathering and making recommendations regarding the next steps. Whether intentionally or not, the attorney's questions signal to the clients the appropriate content of the planning process. A narrow, financially focused interview conveys the sense that estate planning should be narrowly defined. The most powerful way to introduce parents to holistic estate planning is to ask broad, probing questions about their

family, goals, and assets. This implicitly helps parents appreciate the full range of issues they will need to address, as well as the importance of getting input from their children.

The questions that best help parents appreciate the salience of the personal side of their estate planning center on three areas: individuals, relationships within the family, and the estate planning process itself. Parents themselves are arguably the most important individuals in this process—after all, it is *their* estate planning—but clarifying whom are they most concerned about may be helpful. What are their concerns for themselves as a couple and for each other? What are their hopes and fears for their children? What values would they like to see their children embrace after they have passed away? Estate planners may find it useful to plant the seed that parents need to think about their values. In their book, *Silver Spoon Kids*, Eileen and Jon Gallo point out that one major pitfall for some children is “money unaccompanied by values.”<sup>27</sup> Many parents fear that money, especially large amounts of it, will do their children more harm than good. While this may be less true for parents with grown children, many parents still may worry about the negative effects of money on their children.

The strongest desire of most parents is for their children to be happy and healthy, regardless of their economic strata. Planners may ask parents about the legacy they wish to leave with their children and grandchildren? Have they considered writing an ethical will in which they describe the people, values, and experiences that have meant the most to them and of which they want their children to be aware?<sup>28</sup>

In addition to inquiring about parents’ concerns for individuals within the family, asking parents specifically about their hopes and fears regarding the relationships within the family can be helpful. Relationships that need consideration are those between parents, between parents and children, between parents and grandchildren, and between the siblings. For example, does either parent have concerns about the spousal relationship as the estate is planned? How do the parents think their children’s relationships with one another will be affected by their planning? Questioning

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<sup>27</sup> EILEEN GALLO & JON GALLO, *SILVER SPOON KIDS: HOW SUCCESSFUL PARENTS RAISE RESPONSIBLE CHILDREN*, at xvii (2001).

<sup>28</sup> See generally BARRY K. BAINES, *ETHICAL WILLS: PUTTING YOUR VALUES ON PAPER* (2002); RABBI JACK RIEMER, *SO THAT YOUR VALUES LIVE ON—ETHICAL WILLS AND HOW TO PREPARE THEM* (Jack Riener & Nathaniel Stampler eds., 1991) (providing examples of ethical wills drafted during different periods of civilization, from Biblical times to the Holocaust).

them about each relationship may reveal concerns that the parents might not have thought to verbalize.

Finally, inquiring about the parents' feelings and thoughts about the estate planning process itself can be helpful. The prospect of working on their own estate plan may conjure up images of the final chapter in their own parents' lives and how they handled their estate. Some people have strong, negative emotional reactions to the way their parents treated them in their estates and may not want a re-enactment with their own children. Many people do repeat their parents' mistakes despite their best intentions.

Asking these types of questions about the personal side of the family transition is an implicit and powerful way to help parents recognize that the estate planning process is an opportunity—perhaps among their last—to have a profound influence on their children and grandchildren. But explicit descriptions of the advantages of talking openly with grown children about estate plans should augment the implicit messages of the interview. Among the compelling reasons for an inclusive, holistic approach are:

- It gives parents an effective way to address the realities of their final years with the people they love. They can get a clear understanding about how they will be cared for under various scenarios. More than anyone, children are the most likely people to ease the weight felt by parents in dealing with the transition. Family meetings can prepare children for what lies ahead during the parents' remaining years.
- Families become stronger when they gather together with assistance to reflect and discuss what it means to them to be a family, what is most important to them as a family, what their values are, and how they can help one another to achieve their individual and collective goals. These conversations frequently lead to compelling discussions about the role of money in personal happiness and the family members' commitment to one another, their communities, and society. They occasionally lead to establishing trusts and foundations for supporting philanthropic endeavors as a family.
- When leaving gifts for their children, parents usually want what is in their children's best interests, and often, the best way of learning this is to hear directly from the children. Engaging in conversations with grown children can provide access to vital family knowledge of which neither parents nor their advisors may be aware. For example, some grown chil-

dren do not need money and prefer that their parents pass it directly to their children. Other children might not want their parents to control when and how much money their children receive.

- Dialogues with adult children give parents an opportunity to explain their rationale for the intended distribution of assets and possessions, especially any unequal distributions to children, gifts to others, and philanthropic gifts. Because the children must live with their parents' decisions, it makes sense for parents to provide them with a foolproof way of understanding their rationales for those decisions.
- When parents share their plans with their grown children, it allows the grown children to plan their own careers and personal lives with more realistic information. This means children do not waste time guessing about their inheritance or planning for improbable eventualities. Withholding information creates a breeding ground for suspicion, misunderstanding, and even paranoid thinking; sharing information is an antidote for many ills that befall families during this period.
- Many problems that arise when settling estates appear to be financial (such as siblings' vying for assets) but actually stem from unaddressed emotional and interpersonal issues.<sup>29</sup> One commentator estimated that as many as ninety percent of the problems siblings encounter after their parents die could have been eliminated if the parents had talked openly with their children about the estate plans.<sup>30</sup> By addressing underlying issues, talking openly, and eliminating surprises, family meetings can establish the expectation that siblings will deal openly and collaboratively with issues that arise after the parents have died.<sup>31</sup>

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<sup>29</sup> See generally DAN ROTTENBERG, *THE INHERITORS HANDBOOK: A DEFINITIVE GUIDE FOR BENEFICIARIES* (1999).

<sup>30</sup> See *id.* at 17.

<sup>31</sup> In an interview about the family meeting to discuss his parents' estate, Arthur Sills, who now runs the Sills Family Foundation, explained, "It was another rung on the ladder of our family's ability to talk about difficult issues. . . . We knew we were sitting in an unusual conversation." The meeting took place with the help of a facilitator. The parents' estate planning attorney was on hand to answer any questions the sons had. Arthur Sills credits that family meeting with making his two brothers and him even more capable of working through challenging interpersonal issues together later in life. He implied that, by holding

- When parents have ideas about leaving assets to their children jointly, or having some or all of their children co-manage trusts or other assets, sharing these ideas with their children gives the children an opportunity to voice their concerns about the wisdom of the ideas. This is critically important since the parents would essentially be making them partners. Once that information is shared and the children fully appreciate the long-term implications, they can have a hand in deciding if they actually want to be partners and how they should prepare for such a change in their relationship to one another.
- One final advantage for the family, which is also an advantage for the estate planner, is that carefully conducted family meetings ensure that there will be no surprises or hidden agendas after the parents die. The likelihood of conflict is decreased by obviating the need for children to deal with complicated and emotionally charged estate matters at a time when they are most vulnerable emotionally.

Questioning parents about their wishes and goals for themselves and their families, and helping them appreciate the potential downsides of not involving their adult children and the benefits of bringing children into the process can help parents feel ready to engage in a holistic estate planning process. Parents are likely to understand that their choices will have either a positive or negative effect on their family—the effect is unlikely to be neutral—and that engaging their grown children in the estate planning process increases the likelihood of a positive effect.

#### **VIII. MEDIATION TECHNIQUES FOR CONDUCTING FAMILY MEETINGS AND RETREATS**

Family meetings and retreats can be structured in many different ways. Mediation provides the most advantages because it fosters an open, constructive dialogue of difficult subjects, builds a collaborative spirit when people feel at odds with one another, and helps people arrive at mutual understandings and consensual agreements.<sup>32</sup> Employing mediation techniques increases the likelihood that everyone will be comfortable and satisfied with the estate plan that is ultimately developed.

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that family meeting, his parents had raised the bar for all three of them. Telephone Interview with Arthur Sills, President, Sills Family Foundation (Aug. 28, 2004)

<sup>32</sup> Gage & Meza, *supra* note 22, at 190-93.

Despite the many advantages of mediation for family estate meetings and retreats, it has a semantic drawback. Many people associate mediation with conflict. Some families may balk at the idea of mediation for their family meetings because they do not want to think of themselves as being in conflict. In this situation, it is easier to refer to the process as facilitation than to convince people that mediation is perfectly appropriate when there is no extant conflict. Once family members are committed to the value of the holistic approach, they usually lose their qualms about the terminology—especially when they appreciate the legal protections mediation offers that facilitation does not.<sup>33</sup>

To keep sensitive discussions constructive, mediators must be skilled at working with individual pathology, potentially volatile relationships, dark and conflicting family histories, and occasionally the worst sides of human nature. To operate successfully as third-party neutrals in such complex situations, mediators also must understand, to a reasonably sophisticated degree, estate planning, finance, and business. While mediators should be familiar with the basic principles and terminology of estate planning, they should never give expert advice on legal, investment, or tax strategies. In the course of the meetings, the mediators may consult with the planner, the parents may consult with the planner, and the mediators and family may request that the planner participate as an expert in some of the mediation sessions. The flexibility of the mediation process allows the estate planner to enter the process as the expert at any time that it might be helpful (e.g., to educate, to explain the inner workings of a trust, or to answer questions).

In this type of arrangement, adult children typically are very accepting of the role of the parents' estate planner, perhaps because the children trust that mediators are serving them as much as they are serving the parents. The planner clearly represents the parents, and the planner's participation in the process is for purposes other than representing everyone. Estate planners should be certain that any professionals they bring into the planning process are fully qualified and experienced in these respects. Because of the breadth of issues involved, the emotional intensity of the family work, and the duration of the meetings, two professionals with complementary backgrounds may be necessary.

Mediators are neutral, third-party professionals who work for the common good of everyone involved. They strive to get the best ideas on

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<sup>33</sup> We do not consider it problematic if estate planning attorneys refer to the mediators as "family facilitators."

the table and clear up misunderstandings and misperceptions. They work for the entire family, even when recognizing the different roles, authority, and positions of various family members. In estate planning, this means that mediators recognize the role of testator intent and ultimately, the parents can do whatever they wish with their assets.

Mediators also recognize that parents who adopt a holistic planning method want everyone in the family to feel as good as possible about their decisions and not feel angry, cheated, or resentful over the final plan. Therefore, mediators work to achieve the highest possible level of consensus among family members.<sup>34</sup>

Mediation is an informal and flexible process that mediators actively direct and guide. Discussions range from interpersonal dynamics—such as the hurt feelings a daughter carries around for thirty years over a sarcastic comment a mother made—to the disposition of family vacation homes, real estate, furniture, heirlooms, or businesses. Though the focus of discussions is always forward-looking, if a family must deal with the past to move forward in a constructive way, then mediators will facilitate the appropriate discussion. Except about the process itself, mediators do not give advice. They should never advise people about their position on a point, but they should encourage, coax, and motivate people to actively participate, share their thoughts and feelings, and create understandings that have the greatest long-term advantages for everyone involved.

People involved in mediation tend to be extremely open and candid with mediators because everyone gets private time with the mediators. Family members often reveal their worst fears and suspicions, their angriest feelings, and their wildest ideas about possible resolutions to problems. The family members recognize that part of the mediators' job is to help them sort through what is real and what is not, and what is productive and what is not.

People also are willing to be open because they know they can request that the mediators keep confidential any information they are not ready to reveal to the family because it is too sensitive or embarrassing. People who have kept secrets from their entire family for years will share those secrets with mediators whom they have just met. Because what transpires in mediation (e.g., oral and written communications, admissions, offers, and notes) cannot be used in later adversarial proceedings (a real advan-

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<sup>34</sup> There are, of course, parents who, consciously or not, view their estates as vehicles for continuing their control over, or even punishment of, their children. We assume that such parents will not choose a holistic approach that has the opposite objectives.

tage of mediation), people tend to be candid.<sup>35</sup>

### **IX. SOME PRACTICAL CONSIDERATIONS: WORKING WITH FAMILIES**

After the estate planner conducts the initial interviews, describes the range of issues the parents need to consider, and gives them a broad sense of their various options, he or she can introduce the client to the concept of holistic planning and to the family facilitators. The work with the entire family is an addition to the normal estate planning process. It does not replace what the parents' attorney would normally do, but adds to it. With appropriate confidentiality agreements and releases in place, the estate planner briefs the mediators on information gathered during the initial interviews that may be relevant to the planning process. While estate planners should not play the role of the mediator for the clients' family members, they may be called upon to offer expert advice and opinions or to educate family members at some of the mediation meetings.<sup>36</sup>

Mediators and parents discuss the family's and the parents' goals prior to the first family meeting.<sup>37</sup> In a sense, the mediators' first task is to understand the style and culture of the family and what makes them different from other families. This step is important because every estate planning process is unique and designed to meet the special needs of a particular family.<sup>38</sup> Discussions with the parents help set the tone for the

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<sup>35</sup> Most mediators describe the bounds of confidentiality in a mediation agreement, and most jurisdictions provide broad protections to mediation proceedings through statutes and case law. The protections include prohibiting mediators from testifying in any subsequent litigation. *See, e.g.*, CAL. EVID. CODE § 703.5 (West 1995); 120;120; CAL. EVID. CODE §§ 1115-1128 (West Supp. 2003); FLA. STAT. ANN. § 44.405 (West, WESTLAW through 2004 Sec. Reg. Sess.); *Rojas v. Super. Ct.*, 93 P.3d 260, 264-65 (Cal. 2004); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1125 (Cal. 2001); Unif. Mediation Act § 4 (amended 2003), 7A pt. 2 U.L.A. 111 (Supp. 2004)

<sup>36</sup> When the parents' attorney or accountant becomes part of these meetings, it is understood that they are functioning as the parents' expert advisor. Adult children rarely have a problem with their offering professional opinions in this way.

<sup>37</sup> Because a retreat is often the most practical way to bring the family together for meetings, we will assume that the family's meetings take the form of a retreat.

<sup>38</sup> Families vary greatly in their degree of openness. At one extreme are emotionally close families that talk about everything. The members know most of what is going on in one another's lives. At the other extreme are families that practice secrecy, talk very little, and are oblivious to what happens in each other's lives. This distance does not mean they do not care about one another; they just have a different way of expressing care and concern. The majority of families fall somewhere between the two extremes in terms of their openness

retreat, which is one of the most important factors contributing to the retreat's success.<sup>39</sup> The most important outcome of the pre-retreat discussions with the parents is that the parents themselves are generally in sync about how they would like to dispose of their estate.

Meetings with the parents (usually conducted by phone) include separate discussions with each parent so that each has a meaningful chance to voice concerns. More often than not, one or both parents will reveal something to the mediators that they would not have said in the presence of the other. Having the parents come to a meeting of the minds about what they would like to accomplish is an important preliminary step to take before the retreat and may require a face-to-face meeting. The parents do not necessarily need to agree on everything, but they should not be at odds about essential principles. Neither parent should be adamantly opposed to what the other would like to do, and both should approach the retreat and their children with an open mind.

The parents, their estate planner, and the mediators usually decide together exactly whom to include in the process (e.g., whether children's spouses or a drug-addicted son will participate). Bringing all the appropriate adult parties into the process helps achieve the best possible result with the greatest buy-in and the least chance of having the final plan be contested. Mediators conduct telephone interviews with all the adult children before the retreat to ensure that the children understand the reasons for the retreat and to answer any questions about the process. With some families, mediators might ask all the adult children to write out some thoughts and reflections about the family (e.g., shared experiences, family values, special needs of family members) and about any special circumstances or family assets (e.g., trusts, vacation properties, or businesses).

The preferred retreat format lasts between two and four days. The concentrated timeframe is often necessary for logistical reasons.<sup>40</sup> Retreats

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and emotional connection. Importantly, within any family, there may be both closeness and distance between different family members. Knowing these basics about the family will help mediators to establish rapport with individual family members and will help the mediators coach them through the process.

<sup>39</sup> Personal Communication with Thayer Cheatham Willis (June 11, 2004). Willis is the author of *NAVIGATING THE DARK SIDE OF WEALTH: A LIFE GUIDE FOR INHERITORS* (2003).

<sup>40</sup> Occasionally, a family may find that they cannot arrange an extended retreat. In that event, they can arrange several half-day or day-long meetings, but this is usually less desirable than one efficient, intensive retreat. The retreat location should be comfortable and should provide opportunities for family members to escape physically and mentally when they are not in the often emotionally intense meetings.

make it possible for family members to have sufficient time to grasp the complex issues fully, resolve impasses, and make progress. Mediators should maintain tight schedules and manage the meetings, but the schedule should also be flexible and respond to the requirements of the discussions.

Individual meetings before and during the retreat should uncover points of contention, hidden agendas, and information about sibling rivalries and parent-child conflicts. Subsequent meetings with all the family members, or subsets of the family, should clear up misunderstandings and misperceptions, as well as build a greater spirit of collaboration. The purpose of family retreats is not to resolve long-standing, deep-seated family conflicts, but these old conflicts often become less weighty in the course of achieving the family's estate-related goals.

Families discuss and establish their own goals for their pre-estate planning retreats at the start of their time together. The most common goals vary from family to family, but may include some of the following: the parents leave with a clear sense of what they wish to do with their assets; they have clarity about how they will be cared for under various scenarios; the entire family has a sense of what this family transition means to them individually and collectively; they have a better idea of who they are as a family; they all feel that they have had a opportunity to express their feelings and views; the adult children understand their roles vis-à-vis their parents and the parents' care for the remainder of the parents' lives; children have confidence that there will not be surprises after their parents die; and they leave with confidence that, if necessary, they will be able to manage assets, trusts, or businesses collaboratively when the time comes.

During all phases of the planning process, planners and mediators should keep one another fully informed of their contacts with family members and seek one another's input and advice. After the individual and family meetings, mediators typically circulate a summary of the retreat goals and what actually was achieved to all participating family members for their information and comments. Family members should understand the summary will be shared with the parents' estate planning attorney. Mediators may meet with the attorney and parents to discuss the implications of their findings for use in constructing the estate plan. The attorney and parents will then resume the conventional estate planning process. When the plan is complete, families may find it useful to seek the mediators' thoughts and possibly involve them in communicating the results to the heirs.

## **X. CONCLUSION**

Holistic estate planning is unquestionably a new paradigm for the estate planning practice, but it is rooted in well-established principles. The process recognizes, accepts, and embraces changes that are occurring in society as the baby-boomer generation ages and sheds the paternalism of the previous generation. Holistic estate planning follows the path of holistic medicine by helping practitioners respond to broader interests and needs, and it also extends the steps taken by estate and trust attorneys toward utilizing mediation in other areas of their practice.

By broadening the content and deepening the character of the attorney-client relationship, holistic estate planning enables attorneys to recognize better solutions for their clients' needs. It also may result in clients' more fully appreciating the value of the entire range of services offered by attorneys. From a marketing perspective, estate planners who adopt the holistic approach extend their professional networks in their communities and create a benefit for clients that distinguishes them from other practitioners.

Most importantly, because holistic estate planning encourages families to consider seriously the effects of transferring wealth before estate plans are made, it can greatly reduce unexpected and unwanted surprises after the parents' deaths. The generational transition in families is inevitable, but when it is handled in an inclusive manner, it can make a positive difference in the life of every family member.