

## Report From Counsel

Insights and Developments in the Law

Fall 2018

### *6 Tips to Survive the Holidays for Divorced Parents*

For divorced and separated families, the upcoming holidays can be filled with dread instead of joy. Too often, children are caught in the stressful battle between separated parents, who haven't realized they need to come up with new ways to make memories.



Alan Plevy

There are countless issues that lead to arguments during the season, including:

- The question of who will celebrate which holidays where. Are the children at Mom's on Christmas Day, and at Dad's on Christmas Eve? How about on Thanksgiving, when most extended families get together?

- Deciding and handling travel arrangements during the children's school holidays. Who goes to which house, by what time and who gets them there? What if one parent wants to take the kids away on vacation?



Kyung (Kathryn)  
Dickerson

- Parents buying elaborate gifts to one-up each other. "You get a brand new car." "Here's that dog you always wanted." "Enjoy the drum set I sent over to your Mother's house for you."
- The annual "dissing of the other parent" tradition around the holiday meal table, often with Grandma or Grandpa joining in.

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### *Considering the LLC for Your Business Needs*

Among the myriad of issues facing participants contemplating a new commercial venture is the question of which legal organization vehicle to use. While opinions may differ as to the selection of the initial location, staffing or budgeting, the participants in any new venture should have the same goals and agree when it comes to the selection of the form of their corporate entity. Each owner wants to limit his or her personal liability, simplicity of organization, ease of operation and tax advantages. Given these criteria, the Limited Liability Company, or "LLC," should be given strong consideration.

**Business Corporation or "C-Corp":** Traditionally, this was the vehicle of choice for most businesses. The entity is relatively

easy to form; a mere filing of articles of incorporation with the secretary of state does the trick. All shareholders enjoy limitation of liability, meaning they cannot be personally sued for debts incurred by the corporation, and, thus, in a worst-case scenario, cannot lose more than their financial contribution to the corporation. However, the C-Corp requires certain actions to be taken via a board of directors that must operate through the strictures of formal bylaws that prescribe the appointment of officers, notice and meeting requirements. Moreover, the C-Corp potentially subjects shareholders to double taxation; the corporation is taxed on income and the shareholders are then taxed on the

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### *Accolades*

SmolenPlevy is pleased to announce Principals Jason Smolen, Alan Plevy, Daniel Ruttenberg and Kyung (Kathryn) Dickerson are named in the 25th edition of *The Best Lawyers in America*® for 2019. Smolen, Plevy, Ruttenberg and Dickerson were selected for this honor by other leading lawyers from the Washington, D.C. area in the specialties of business organizations, family law, family law mediation, trusts and estates.

### *In the Community*

SmolenPlevy is pleased to announce Partner Joshua B. Isaacs began serving as President of the Fairfax Law Foundation Board of Directors on July 1. The Fairfax Law Foundation provides law-related education to the youth and community; direct legal assistance to the indigent and those with special needs; and promote access to and improvements in the justice system within Fairfax County, Virginia.

SmolenPlevy Principal Dan Ruttenberg, Vice President of Devotion To Children, is proud to announce the firm is the Chip Sponsor for the 8th Annual Cards 4 Kids™ Texas Hold'Em Poker Tournament. The event will be held on Saturday, September 22 at Fleming's Steakhouse & Wine Bar. Registration, raffle and silent auction start at 11 a.m. and the shuffle up and deal begins at noon. Register for the event online at [devotiontochildren.org](http://devotiontochildren.org). All proceeds from Cards 4 Kids™ will be used to help families struggling to obtain affordable childcare services in the Washington metropolitan area.

# When Should You Turn down an Inheritance?

“Thanks, but no thanks.” If you expect to receive an inheritance from a family member, but you do not wish to accept it, it is ideal to use a qualified disclaimer to refuse the bequest. As a result, the assets will bypass your estate and go directly to the next beneficiary in line. It’s as if the successor beneficiary, not you, had been named as the beneficiary in the first place.



Jason Smolen

Why would you ever look this proverbial gift horse in the mouth? Frequently, using a legally valid disclaimer (see “5 Legal Requirements for Qualified Disclaimers”) will save gift and estate taxes, while redirecting funds to where they ultimately would have gone anyway. This estate planning tool is designed to benefit the entire family. Be aware that a disclaimer doesn’t have to be an “all or nothing” decision. It’s possible to disclaim only certain assets, or only a portion of a particular asset, which would otherwise be received.

## Reasons for Using a Disclaimer

Federal estate tax laws are fairly rigid, but a qualified disclaimer offers some unique flexibility to a forward-thinking beneficiary. If you are thinking about a waiver, you should consider:

**Gift and Estate Tax Savings:** This is often cited as the main incentive for using a qualified disclaimer. For starters, the unlimited marital deduction shelters all transfers between spouses from gift and estate tax. In addition, transfers to non-spouse beneficiaries, such as your children and grandchildren, may be covered by the gift and estate tax exemption.

Currently, the exemption can shelter a generous \$11.2 million in assets. By maximizing portability of any unused exemption amount, a married couple can effectively pass up to \$22.4 million in 2018 to their heirs free of gift and estate taxes.

However, despite these lofty amounts, wealthier individuals, including those who aren’t married and can’t benefit from the unlimited marital deduction or portability, still might have estate tax liability concerns. By using a disclaimer, the exemption won’t

be further eroded by the inherited amount. Assuming you don’t need the money, shifting the funds to the younger generation without it ever touching your hands — as well as bypassing your taxable estate — can save gift and estate taxes for the family as a whole. It should also be noted that the current exemption rates are scheduled to revert to almost half the present amount at the end of 2025, and state estate tax rates may be a factor where you live.



Daniel  
Ruttenberg

## Generation-Skipping Transfer (GST) Tax:

Disclaimers may also be useful in planning for the GST tax. This tax applies to most transfers that skip a generation, such as bequests and gifts from a grandparent to a grandchild or comparable transfers through trusts. Like the gift and estate tax exemption, the GST tax exemption is \$11.2 million for 2018.

If GST tax liability is a concern, you may wish to disclaim an inheritance. For instance, if you disclaim a parent’s assets, the parent’s exemption can shelter the transfer from the GST tax when the inheritance goes directly to your children. The GST tax exemption for your own assets won’t be affected.

**Family Businesses:** A disclaimer may also be used as a means for passing a family-owned

business to the younger generation. By disclaiming an interest in the business, you can position stock ownership to your family’s benefit.

**Creditor Protection:** Any inheritance you receive would immediately be subject to claims of creditors. It might be possible to avoid dire results by using a disclaimer to protect these assets. However, be aware that state laws and federal bankruptcy laws may defeat or hinder this goal. Consult with your estate planning advisor about your specific situation.

**Charitable Deductions:** In some cases, a charitable contribution may be structured to provide a life estate, with the remainder going to a charitable organization. Without the benefit of a charitable remainder trust, an estate won’t qualify for a charitable deduction in this instance, but using a disclaimer can provide a deduction because the assets will pass directly to the charity.

## Look before You Leap

Before you “give away the farm,” make sure that you’re standing on firm legal ground and that using a disclaimer is the best approach. Find out about the applicable laws, especially if you’re relying on a disclaimer for creditor protection. Be careful to meet any deadlines

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# The Custody and Visitation Rights of Grandparents and Siblings in Virginia

The court will make every effort to do what it believes is in the child’s best interest in family law cases involving custody and visitation. The court typically believes it is in the best interest of the child to remain with his or her biological parents or that the child should at least be able to visit his or her biological parent. There are many circumstances that may prevent this, such as adoption, divorce, or the removal of a child due to a parent being declared unfit. In certain cases, other family members, such as siblings or grandparents, can request time with the children. The Commonwealth of Virginia allows relatives

with a “legitimate interest” in maintaining a relationship with the minor child the opportunity to petition for visitation.

## Visitation

In some cases, a parent to a child may prohibit contact with the child’s siblings or grandparents. This may be because of a divorce, a child being placed in the foster care system or even adopted. For example, one parent may prohibit the child from seeing the parents of a divorced or deceased spouse, or his or her children from another marriage,

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# The Custody and Visitation Rights of Grandparents and Siblings in Virginia

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even though those grandparents and siblings may be biologically related to the child.

Siblings who may be over the age of 18, who are estranged from the common parents of the child, who may be the product of a prior marriage, or are the half- or stepsibling to the child are generally not considered when making custody decisions. However, the court recognizes the right of grandparents and siblings of an estranged child to petition for visitation rights in these instances, if they are deemed to be a person with a "legitimate reason."

When one or both parents deny contact of the child with a grandparent or sibling, the petitioning party must first prove that they have a "legitimate interest" and that the child would experience real and actual harm to his or her health or welfare without the grandparent or sibling in his or her life. The court must also find that allowing visitation would be in the best interest of the child. Throughout the arguments, the court will investigate the parent's reasons for keeping the child from the relatives and determine whether these reasons actually warrant this separation.

Stepparents may also have certain visitation rights and the opportunity to petition for contact.

## Custody

It is typical in battles over custody for the court to work to keep the child with his or her natural parent. In 2000, the U.S. Supreme Court ruled that parents have the ultimate right to custody over their children and grandparents and other guardians do not. This custodial right belongs only to the parents and the rights of these other relatives are second to that of the parents in the eyes of the court. However, many states, including Virginia, allow persons with a "legitimate interest" to petition for custody. This can be complicated, as federal law recognizes the rights of the natural parent to control and care for his or her child. A person who is not a parent may be granted custody if they can prove:

1. The biological parent should not have the legal right to custody
2. Granting custody to the non-parent would be in the best interest of the child

Before determining whether to remove

custodial rights of the natural parent and award them to the grandparents, the court will consider the arguments from the current guardians of the child, the biological parents, the party requesting custody, and/or other caretakers of the child. The court will also take into account the fitness of the biological parent to raise a child. To do this, the court will consider the mental stability of the parent, the age and developmental needs of the child, the relationship between the parent and child, the history of abuse within the family, and more.

While family members may argue over who is best suited to raise the child or who should be permitted in the child's life, the judge will ultimately make the decision based on what will be most beneficial to the child, regardless of the wishes of the parents and other relatives taking into account the mandates of the law.

If you have any questions regarding custody rights or any other family law matters, please contact Alan Plevy at [ablevy@smolenplevy.com](mailto:ablevy@smolenplevy.com) or Kyung (Kathryn) Dickerson at [kndickerson@smolenplevy.com](mailto:kndickerson@smolenplevy.com).

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# Considering the LLC for Your Business Needs

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distributed dividends occasioned by that income. Dividends are not deductible from C-Corp income.

**Subchapter S Corporation:** Small qualifying corporations can make an election pursuant to Subchapter S of the Internal Revenue Code to escape the twofold taxation. A benefit of an "S-Corp" is that a reasonable salary is what is taxed as ordinary income and deductible to the corporation. Profit is like a dividend, but, unlike a C-Corp dividend, S-Corp distributions, though taxable at ordinary rates, are not taxed at the corporate level and are not subject to employment taxes.

**General Partnership:** This option requires no formal organization and is a "pass-through" entity for I.R.S. purposes; only the partners and not the partnership are taxed. The

problem is that relatively minor decisions will most likely involve a majority of partners and, more importantly, each partner is vicariously liable for partnership activities and for the full amount of partnership indebtedness. There is no limitation of liability.

**Limited Liability Company (LLC):** The LLC is often an entity of choice as it provides liability protection while also avoiding double taxation. The LLC is neither a corporation nor a partnership, but rather enjoys the best aspects of both. The entity is formed in most states with the filing of articles of organization. Unlike a corporation, the LLC is not encumbered with the burdens of formal meeting requirements. It acts through one or more members or managing members and, unlike a partnership, both the managing and non-managing members benefit from

limited liability. However, it is strongly recommended that a formal document (an operating agreement) be entered into by the members to govern the LLC's affairs. In addition to insulation from liability, the LLC is also a tax pass-through and, thus, shields members from double taxation. While specific and unique needs and circumstances must always be considered in making any decision, the LLC is an important option that, oftentimes, is one of the best options. Though there are other entity options, the above are the most commonly employed.

If you have any questions about which legal organization vehicle to choose or any other business law matter, please contact Jason Smolen at [jdsmolen@smolenplevy.com](mailto:jdsmolen@smolenplevy.com) or Dan Ruttenberg at [druttenberg@smolenplevy.com](mailto:druttenberg@smolenplevy.com).

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# 6 Tips to Survive the Holidays for Divorced Parents

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The uncertainty and stress of being in a separated or divorced family can cause disagreements to quickly escalate into arguments – a tug-of-war between parents. But, there are ways to avoid conflicts, and it starts with working with the other parent. Yes, deciding logistics and other issues with the other parent can be done. (Quick tip: remember you're doing it for your children.) Follow these steps you can take as a parent to make things easier during the holiday season:

**Plan Ahead:** It is imperative to create a plan ahead of time that includes when and where your children will be. Having everything outlined eliminates the chance of unexpected surprises. Confirm the plan in writing via text message or email. Don't forget to keep the kids updated in order to prevent any anxiety they might feel from being kept out of the loop. This is also extremely helpful in blended families, where each parent may have children from previous marriages, and the comings and goings are constant. Vacations with children should be proposed, discussed and worked out far in advance.

**Avoid a Gifting Competition:** An often unspoken problem divorced parents face

is the desire to outdo the other. A gifting competition is a no-win proposition, often leaving you in debt, overwhelmed and hurt. Too often, we hear about a parent who buys a dog for their child, even though they know the pet will not be able to live at the other parent's house. Yes, children may love the gift, but it isn't worth the added stress on the child.

**Behave Like an Adult:** Maintain your composure and remain civil and businesslike with the other parent. Remember your children still love them, and speaking rudely about the other parent in front of your children will upset them and exacerbate their stress. Make sure their aunts, uncles and grandparents follow the same rules. Children would rather feel at peace, so avoid the bickering. Otherwise, when they grow older, they might not want to visit.

**Put Your Children First:** After a divorce or separation, there is often a mixture of negative emotions: sadness, anger and disappointment. Make sure you listen to your children's concerns and let them know that it is okay to share these emotions. Letting them vent can be a big help.

**Create New Traditions:** It's a new chapter, meaning now is the time for new, unique holiday traditions. Instead of decorating the Christmas tree, going caroling or hanging holiday lights (which you may have done with both parents in the past), begin a family game night, run a 5k or volunteer to feed the homeless with your children. New traditions help kids focus on the fun, alleviate their stress and makes the season special.

**Give Yourself a Gift:** Divorced or separated parents may feel sad, alone and stressed. Occasionally, because of the established visitation schedule, a parent might find they have more free time when their child is with the other parent. While children are learning to adapt to an established structure, you should, too. Use this time to do something special or create a tradition for yourself. By prioritizing your happiness, you will be more upbeat during the time you get to spend with your children for the holidays.

For more information, contact Alan Plevy at [ablevy@smolenplevy.com](mailto:ablevy@smolenplevy.com) or Kyung (Kathryn) Dickerson at [kindickerson@smolenplevy.com](mailto:kindickerson@smolenplevy.com).

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imposed under federal and state laws. And be aware that multiple disclaimers may be required if you're not the only beneficiary.

Finally, be absolutely certain about the next beneficiaries in line. Once you've checked all the boxes, please contact Jason Smolen at [jdsmolen@smolenplevy.com](mailto:jdsmolen@smolenplevy.com) or Dan Ruttenberg at [dhruttenberg@smolenplevy.com](mailto:dhruttenberg@smolenplevy.com).

### 5 Legal Requirements for Qualified Disclaimers

To be legally valid as a qualified disclaimer, the following five requirements must be met:

1. The disclaimer is made in writing and signed by the disclaiming party.

2. The disclaimer must be irrevocable and unqualified.

3. The disclaimant (that is, the person disclaiming) must not accept the interest or any of its benefits.

4. The disclaimer is delivered to the person or entity charged with the obligation of transferring the assets no more than nine months after the date the property was transferred or nine months after a disclaimant who is a minor reaches age 21.

5. The interest must pass to a person other than the disclaimant without any direction by the disclaimant.

## In the Media

The last thing you want your loved ones to be burdened with after you die is the overwhelming process of probate. Some probate periods are short, but others seem to never end. On *The Probate Nation* TV show, SmolenPlevy Principal Dan Ruttenberg discusses good and bad probate avoidance techniques. Watch the video here: [http://tpn.clubexpress.com/content.aspx?page\\_id=22&club\\_id=836926&module\\_id=297516](http://tpn.clubexpress.com/content.aspx?page_id=22&club_id=836926&module_id=297516)

*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*