

The Estate Planning Advisor

Estate Planning for Unmarried Couples

By Richard J. Shapiro, J.D.

There are an increasing number of senior couples in long-term, committed relationships, who never intend on getting married. There are many reasons for this phenomenon: maybe a partner is afraid of losing retirement or Social Security benefits from a deceased spouse that would be forfeited upon remarriage; one or both partners may have been through a messy divorce and do not believe marriage is necessary for their relationship; or perhaps, they are a same-sex couple who, under existing New York law, cannot legally marry.

Whatever the reasons for not making it to the altar, unmarried couples face special estate planning challenges. For those with larger estates, the “unlimited marital deduction” is not available as a planning tool. The unlimited marital deduction allows an individual to leave unlimited amounts of assets to his or her surviving spouse. The assets would be subject to estate tax only upon the second spouse’s death. With proper planning, married couples can currently shield up to \$7 million in assets from federal estate tax. In 2009, an unmarried person can leave no more than \$3.5 million to a surviving partner free of federal estate tax. All sums in excess of that amount are subject to federal estate tax upon the first partner’s death.

What if an unmarried couple, like the majority of Americans, never gets around to doing any estate planning? If one partner were to become incapacitated, the “well” partner would have no legal authority to handle the personal, financial or medical affairs of the “ill” partner. The well partner might have no alternative but to file a court petition to be appointed as the ill partner’s legal guardian. If there is opposition from any of the ill partner’s children or other family members, the well partner’s lack of legal standing might prevent him or her from gaining appointment as guardian, thereby losing all control.

If one partner dies without a will, trust or other testamentary disposition, the surviving partner retains no statutory rights to any of the deceased partner’s property. A surviving spouse, however, would retain the statutory right to the first \$50,000 of the deceased spouse’s assets, and one-half of the remainder of the assets (this is assuming the decedent had children, who would be entitled to receive the other half of the assets). Unlike a number of states, New York does not presently recognize “domestic partnerships” for unmarried couples, nor does New York law provide for “common law” marriages.

What are unmarried couples to do? First, they should ensure that they have well drafted estate planning documents, which typically include wills, living wills, health care proxies, powers of attorney, and possibly revocable living trusts and irrevocable “Medicaid planning” trusts. These documents must clearly spell out the role that the

surviving partner is to play as health care agent, executor, trustee, agent under the power of attorney, etc. Just as important, if the couple wishes that the surviving partner receive some or all of the first partner's retirement accounts and life insurance proceeds upon the first partner's death, it is critical that the beneficiary designations for these types of assets name the partner as the primary beneficiary.

When it comes to Medicaid planning, if one partner seeks Medicaid coverage for long-term care costs, the assets and income of the "well" partner are *not* counted in determining the Medicaid eligibility of the "ill" partner. However, unmarried couples cannot shift assets between themselves, nor can they utilize the "spousal refusal" technique that is available to married couples to help preserve a greater amount of the ill spouse's assets.

Planning for unmarried couples is fraught with emotional landmines, not to mention potential tax and Medicaid traps. Unmarried couples dealing with these issues should consult with an experienced estate planning attorney to review their options.

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