

The Estate Planning Advisor

Planning for Unmarried Couples

By Richard J. Shapiro, J.D.

The number of unmarried senior couples in long-term relationships continues to increase. There are many reasons for this phenomenon: sometimes, a partner is afraid of losing retirement or Social Security benefits from a deceased spouse that would be forfeited upon remarriage; or maybe, one or both partners have been through a messy divorce and do not believe marriage is necessary for their relationship; or perhaps, they are a same-sex couple and cannot legally marry.

Whatever the reason for not making it to the altar, unmarried couples face special estate planning challenges. For those with larger estates, there will be the loss of the “unlimited marital deduction.” This planning tool allows married couples to leave unlimited amounts of assets to the surviving spouse. Assets would only be subject to estate tax upon the second spouse’s death, and with proper planning, married couples can today shield up to \$4 million in assets from Federal estate tax. In 2007, an unmarried person can leave no more than \$2 million to a surviving partner free of Federal estate tax, with all sums in excess of that amount subject to Federal estate tax upon the first partner’s death.

What if, like the majority of Americans, an unmarried couple never gets around to doing any estate planning? If one of the partners were to become incapacitated, the “well” partner would have no legal authority to handle the personal or health related affairs of the “ill” partner. The well partner might have no alternative but to file a court petition to be appointed their 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.

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 “right to elect” to receive at least one-third of a deceased spouse’s property – even if the deceased spouse’s will left nothing to the surviving spouse. Unlike some states, New York does not 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. 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 unmarried couples make sure 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 of the "well" partner are *not* counted in determining the Medicaid eligibility of the "ill" partner. Unlike married couples, however, unmarried couples cannot shift assets between themselves and utilize the "spousal refusal" technique to help preserve a greater amount of the ill partner's assets.

Planning for unmarried couples is fraught with emotional landmines, not to mention potential tax and Medicaid traps. It is urged that unmarried couple dealing with these issues consult with experienced counsel to review their options.

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