



The Wealth Counselor

A monthly newsletter for wealth planning professionals

From [Michael Wittick](#)

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My practice is people oriented and exclusively devoted to estate planning, estate and trust administration, estate and trust litigation, asset protection and business planning. My newsletter highlights wealth planning issues designed as helpful insights to your practice

Planning for Unmarried Couples

The 2000 census counted nearly 5.5 million U.S. unmarried couples sharing the same household, almost 8 times the number counted in 1970 and nearly 10% of the 60 million U.S. couple households counted. Of these, many are widows and widowers who choose not to marry for various reasons, and approximately 1% of these unmarried couples are same-gender partners.

Because U.S. and most state laws afford special benefits for those married to a person of the opposite gender, many common planning techniques that take advantage of those benefits simply do not work for unmarried or same-gender couples. As a consequence, the planning needs of the unmarried or same-gender couple is often far greater than that for a married opposite-gender couple with equivalent assets. This issue of The Wealth Counselor examines many of the unique planning needs of unmarried and same-gender couples and the opportunities that exist for all members of the planning team in working with these clients.

Unmarried and Same-Gender Couples

Some couples choose not to marry, for example, because of the risk to one partner's assets if the other needs long-term care, the loss of alimony, or the loss of Military retiree health and other benefits.

Other couples cannot legally marry under the law of their domicile, particularly same-gender couples. While some states (e.g., Massachusetts) and foreign countries (e.g., Canada) recognize and legalize such same-gender unions, U.S. federal law and the laws of many states do not recognize these unions. The federal Defense of Marriage Act ("DOMA"), signed into law in 1996, provides that, for purposes of federal law, marriage is "a legal union between one man and one woman as husband-and-wife" and a "spouse" is defined as referring "only to a person of the opposite sex who is a husband or wife."

State and Federal Law Considerations

Many state and federal laws clearly favor and provide special priority or benefit to the opposite-gender spouse and blood relatives. Those who are outside those categories have neither rights nor recognition under these laws. Therefore, unmarried and same-gender couples are very unlikely to accomplish their planning goals without knowledgeable professional assistance and counseling. Examples of where state law generally will produce an undesired result in the absence of planning are:

- Who will be able to make health-care decisions in the event of incapacity?
- Who will be chosen as a partner's guardian if one should be needed?
- Who may take custody of the deceased partner's body?
- Who may direct the burial or cremation and disposition of remains?
- Who will receive the deceased partner's assets?
- Who will get what assets in the event of the dissolution of the partnership?

In addition, unmarried couples without children may have different contingent beneficiaries, which also may necessitate more complex planning.

Planning Tip: Proactive planning is essential to accomplish even the most basic goals of unmarried and same-gender couples because the law's default provisions generally do not recognize their relationship.

Joint Tenants with Right of Survivorship

Many unmarried and same-gender couples want to leave everything to the surviving partner. Without competent advice, many opt for the apparent simplicity of titling assets in Joint Tenancy with Right of Survivorship (JTROS) to accomplish their objective. JTROS also provides the satisfaction of being similar to ownership by a heterosexual married couple. But, for the unmarried and same-gender couple, titling assets in JTROS has significant pitfalls, risks, and disadvantages.

First, there are the estate tax problems. The law treats a heterosexual married couple as owning JTROS assets 50/50 for purposes of estate taxes, such that only 50% of the value of a JTROS asset is included in the estate of the first spouse to die. In stark contrast, when an unmarried couple own

property as JTROS, the law puts 100% of each JTROS asset's value in the estate of the first to die; the survivor has the burden of proving his or her contribution to the equity of the asset. Not only that, unless the partners' deaths are within a few years of each other, all of the property will be subject to estate tax, and at full value, in both partners' estates!

Gift taxes, too, may present a problem. Depending upon the type of property and the applicable state law, changing how property is held may be deemed to be a gift subject to federal and state gift taxes.

Planning Tip: Unmarried and same-gender couples can create significant federal and state estate and gift tax liability inadvertently by adding a partner to an asset as joint tenant with rights of survivorship.

No Marital Deduction or Marital Gift Tax Exemption
Using the federal marital estate tax deduction, a married person can transfer an unlimited amount of property to his or her spouse upon death. This is the common "A/B" planning used to delay imposition of federal estate tax until the death of the surviving spouse. Such planning is not available for unmarried couples because there is no spouse. With a same-gender couple, DOMA bars even those who are legally married from using this planning technique. Therefore, unmarried and same-gender couples must plan to avoid imposition of estate tax upon the death of the first partner to die.

Likewise there is also no unlimited gift tax exemption for lifetime transfers to anyone but an opposite-gender spouse. Unmarried and same-gender couples cannot transfer assets between themselves to equalize their estates like heterosexual married couples can, because transfers in excess of the annual gift exemption (\$12,000 per person per year in 2008) are subject to federal gift tax and must be reported to the IRS. Gift splitting is also unavailable to unmarried and same-gender couples.

Retirement Benefits & Social Security
A surviving partner has no survivor benefit under the deceased unmarried or same-gender partner's social security. Further, most private retirement plans will not allow a joint retirement annuity with anyone other than an opposite-gender spouse and many will only allow participants to name an opposite-gender spouse or blood relative as a beneficiary. And only surviving spouses can "roll over" an IRA or qualified plan to their own non-inherited IRA.

Planning Tip: It is critical that the advisor review the retirement plans of each partner's employer to determine the options available to the partners. This information is necessary to ensure an accurate determination as to not only the planning options available, but also the capital needs of the survivor. Life insurance can replace retirement benefits and social security that are unavailable to a surviving unmarried or same-gender partner.

Generation-Skipping Transfer (GST) Tax Issues

The GST tax is an onerous tax that applies at the maximum federal estate tax rate (currently 45%). If one partner is more than 37 1/2 years younger than the other, that younger partner is a GST "skip" person relative to the older. That means that transfers from the older to the younger partner during lifetime and at death in excess of the annual exclusion will result in the automatic allocation of GST exemption unless an appropriate option exercise is made on the older partner's gift or estate tax return. Transfers in excess of the exemption and exclusion will be subject to the GST tax. In addition, one partner's children who are more than 37 1/2 years younger than the other partner are GST "skip" persons for gifts and bequests from that other partner.

Other Considerations

Unlike an opposite-gender surviving spouse, a surviving unmarried or same-gender partner cannot disclaim assets into a trust for his or her benefit. Therefore, an unmarried or same-gender couple must be very careful in planning for the possible use of disclaimers. Also, unlike in divorce, there is no tax-free transfer of asset interests upon the dissolution of the relationship between unmarried and same-gender couples.

Planning Tip: Disability insurance is often a critical component of any plan for unmarried or same-gender partners because of the statutory bias against those who are not opposite-gender spouses.

How to Plan for Unmarried Couples

Revocable Trusts

Revocable trusts are an excellent tool when planning for unmarried and same-gender couples because these trusts can solve many of the planning dilemmas discussed above. If the trust maker funds his or her assets to the trust during lifetime, those assets are available to care for the trust maker and/or the partner, as the trust specifies, upon the trust maker's disability during his or her lifetime.

If drafted correctly using a support or "HEMS" (Health, Education, Maintenance and Support) provision, upon the trust maker's death the surviving partner can access the trust's assets without subjecting them to additional estate tax at his or her death. Also, the trust maker can determine the ultimate distribution of the trust assets following the death of the surviving partner and even revoke the trust if there is a change in planning goals and objectives. A revocable trust also provides the added benefit of privacy as to the trust maker's beneficiaries.

Living trusts also avoid automatic court involvement during disability and death. This is important because, as discussed above, there are statutory preferences in any court proceeding for blood relatives, whether or not they share the unmarried couple's views of their relationship. Moreover, a judge may be biased against unmarried and same-gender couples. A will-based plan opens the couple to court involvement in their affairs, for instance to appoint a guardian or conservator for an incapacitated partner, and typically it is the non-incapacitated partner who has to start the court proceedings. With living trusts, on the other hand, the non-incapacitated partner can be the successor trustee, and the burden will then be on the incapacitated partner's family to bear the costs and expenses if they want to challenge the incapacitated partner's planning and trust documents.

Planning Tip: Properly drafted revocable trusts can ensure that unmarried and same-gender partners' goals and objectives are met, both in case of disability and after death. With revocable trusts, the burden is on disgruntled blood relatives of the trust maker to sue to set aside the trust, which is usually a difficult and expensive undertaking.

Planning Tip: A will-based plan virtually guarantees the involvement of the courts, where personal prejudices and statutory preferences may disadvantage the surviving or non-incapacitated partner vis-a-vis the disabled/deceased partner's blood relatives. Often, a will-based plan will require that the surviving or non-incapacitated partner be the one who begins the court case.

Life Insurance

Life insurance is a particularly useful and often critically important planning tool for unmarried and same-gender couples. In addition to providing income replacement and even wealth creation for

the surviving partner, life insurance can provide the liquidity necessary to pay estate taxes, including those that result from there being no marital deduction for such a couple.

If a partner has children, life insurance also can provide funds for distributions to them without diminishing the desired asset transfer to the surviving partner, such as the deceased partner's interest in the couple's home. Life insurance can also be used to make sure that the survivor has the cash needed to pay off any liens against those assets.

Planning Tip: State law determines whether one unmarried or same-gender partner has an insurable interest in the other, but most jurisdictions now recognize an insurable interest with these types of relationships.

Planning Tip: Life insurance, particularly if owned by an Irrevocable Trust, can help preserve confidentiality by giving blood relatives neither the right nor the opportunity to learn of the existence of the insurance or the amount of policy proceeds received.

Conclusion

Due to the numerous statutory provisions favoring opposite-gender spouses and blood relatives, the planning needs of unmarried and same-gender couples are often far greater than the needs of similar married opposite-gender couples. By working together, the planning team can ensure that unmarried and same-gender couples achieve their unique goals and objectives, both during lifetime and after death.

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You have received this newsletter because I believe you will find its content valuable, and I hope that it will help you to provide better service to your clients. Please feel free to [contact me](#) if you have any questions about this or any matters relating to estate planning.

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