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Estate Planning for Unmarried Couples

By Abbe I. Herbst

Almost all of us know within our own personal circle of friends, family, business associates or acquaintances, those who live together but are not married. Although the issues discussed in this article apply to same sex couples, the discussion that follows is not limited to them. It applies to heterosexual couples living together (the old as well as the young), as well as to same sex couples. All unmarried couples living together — whether of the same sex or the opposite sex — shall be referred to as "unmarried couples" in this article.

Federal and state laws have come a long way in recognizing the rights of members of unmarried couples, but there are still some major differences between the rights and privileges accorded to them and those of married persons. In some cases, such as the freedom to designate the beneficiary of a qualified retirement plan without the need to obtain the consent of a spouse, the rights of unmarried couples may actually be broader than those of married couples.

Federal Benefits That Are Available Only to Traditional Married Couples

Under the 1996 federal Defense of Marriage Act, Congress barred federal recognition of same sex marriages and allowed states to do the same. As a result, there are many federal tax benefits that are available only to married heterosexual couples. Such benefits include filing joint income tax returns, utilizing the unlimited marital deduction for gift and estate tax purposes and the presumption that spouses are of the same generation for generation-skipping transfer tax purposes. Thus, the members of an unmarried couple cannot freely transfer title or transfer assets to each other without possible adverse gift and estate tax consequences.

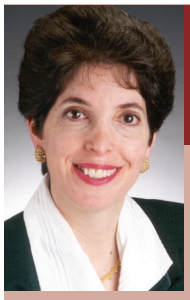
Social Security survivors' benefits are not available to the survivor of a couple, no matter how committed to each other, unless the couple consists of a man and a woman.

But there are also some restrictions on tax planning that, while applicable to traditional married couples, do not apply to unmarried couples. For example, the special valuation rules of Chapter 14 of the Internal Revenue Code do not apply to unmarried couples (who are not considered "members of the family" under section 2704(c) of the Code), and so the gift leveraging technique known as the grantor retained interest trust remains available to unmarried couples. Traditional, married couples can no longer use such trusts for tax savings.

> "The **rights** of unmarried couples **may actually be broader** than those of married couples."

Documents That Require Special Attention

It is important that each member of an unmarried couple make sure, if it is his or her intention to make the other the beneficiary of life insurance or qualified retirement plans such as IRAs, 401(k) plans and 403(b) plans, that the proper beneficiary designations be completed. Unlike the case of a married couple, in which the surviving spouse is often the default beneficiary if there is no designated beneficiary, the taker in default as to an unmarried couple is unlikely to be the surviving partner.



who's who

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Similarly, if it is the intention that the other member of the unmarried couple serve as health care agent for medical decisions or have the power of attorney for financial matters, or even have the final say as to the disposition of the body after death, appropriate advance directives should be executed granting those rights to the partner.

The question of whether to use revocable trusts rather than wills in the case of unmarried couples is a difficult one to answer. The problem arises because, in the case of wills, in most states spouses and those who are related by blood to the decedent must receive notice of the probate proceeding, and it is they who have the right to object. If the will leaves the estate to the other member of the unmarried couple, the blood relatives may be angry, hurt, disappointed and disapproving, and they might well contest the probate of the will. If, however, the blood relatives understand the bond between the members of the unmarried couple, then the relatives are unlikely to stand in the way of their deceased relative's final wishes.

Revocable trusts do not require the consent on the part of the spouse or blood relations to be effective, but in order for such trusts to bypass the probate process they must be completely funded during lifetime. This means that all bank accounts, tangible personal property, stocks, bonds, brokerage accounts, real estate, etc., must be transferred or assigned to the revocable trusts. If any assets remain in the name of the decedent, it will be necessary to probate the will, and face possible delays from uncooperative relatives of the deceased partner.

Helpful Tip: *Unlike married couples, who can file their income tax returns as married filing jointly or as married filing separately, each member of an unmarried couple can file only as a separate taxpayer. Nevertheless, by being mindful as to who pays for various deductible items, it is possible for an unmarried couple to reduce the total household income tax bill.*

For example, if the couple wishes to make a charitable contribution, it should be made from the assets of the partner with the higher income, so that the benefit of the charitable deduction will save more in taxes than if it were made by the other partner. Conversely, as to miscellaneous itemized deductions, such as investment and tax advice, which are not deductible unless they exceed 2% of adjusted gross income, it would be better for the partner with the lower income to pay them, so that the 2% threshold could be reached sooner, making more of those expenses deductible.

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