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## Unwed and Planning

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In 2005, the number of unmarried households surpassed those of married couples in the United States, according to the U.S. Census Bureau. Estate planning for such couples can be significantly more complex than for the typical client, as they require more documents than traditional married couples to address their legal needs. Adding to the confusion, the laws affecting these couples are in flux.

Nonetheless, such couples are a growing percentage of your client base today. In fact, baby boomers are on track to become the fastest-growing group of unmarrieds to protect their benefits and children's inheritances. Advisors should start planning for these clients by uncovering exactly what it is they need.

There are many reasons why couples may choose not to walk down the aisle today. Many opposite-sex couples choose not to marry in order to manage their financial, family, political and religious concerns better. For same-sex couples, on the other hand, it is often not their choice, since they do not have the option of entering into federally recognized marriages.

Two key benefits of single status may also prevent couples from getting hitched. First, the assets of unmarried partners do not count toward Medicaid eligibility. And second, unmarried individuals can collect Social Security based on their deceased spouses' earnings. The soft economy and recent market decline have made people care more about these benefits than ever before, says Peg Downey, partner with Money Plans, a financial planning firm in Silver Spring, Md.

### TRICKY TECHNICALITIES

No matter the reason for avoiding their vows, the costs to unmarried couples of inadequate estate planning are high. Sure, the costs can also wallop opposite-sex married couples and single folks, but planning for their unmarried counterparts is significantly more complicated.

This is because in cases of death, disability or the end of the relationship, federal and state governments favor those whom they define by law as members of the same family. A partner—even a same-sex married partner—typically is not considered a family member, although this is beginning to change, especially at the state level (see "The Legalities" below). This means partners could inherit nothing, get socked with higher taxes, be denied access to their hospitalized partner or even lose custody of the couple's children.

Many of these challenges can be managed using wills, trusts and other estate planning methods. Financial advisors should urge their clients to address these issues with attorneys. But advisors' role in estate planning should begin before the lawyers get involved.

A financial advisor's contribution to estate planning starts at the beginning of his or her relationship with the client. Don't assume you're planning only for the person in front of you, says Barry Taylor, a portfolio manager with Bingham, Osborn & Scarborough in San Francisco. "Just because they're not married does not mean they don't have a domestic partner or same-sex relationship," he adds. To help uncover relationships, use neutral language, such as "partner" or "domestic partner" instead of "husband/wife" or "spouse" on new client questionnaires, Taylor advises.

Because of the myriad legal complexities, learning about these couples' assets is even more important than with traditional married clients. Opposite-sex spouses have a claim on the estate if their spouses die without a will. That's typically not true for unmarried and same-sex spouses, although laws vary by state. Instead, defaults favor blood relatives—even if they are estranged.

Proper documentation requires a detailed knowledge of clients' assets. Don't leave research about assets up to estate planning attorneys. Advisors can learn more about their clients' assets than an estate planning attorney who only spends a few hours with them. "Attorneys go through client questionnaires and don't necessarily review a formal financial statement or flow chart of assets," says J.T. Hatfield Smith, vice president of SPC Financial in Rockville, Md.

Common-law marriage survives in few states and has stringent requirements, including holding yourself out as married, so few qualify, says James Tissot, president of Prism Planning in New York City. He remembers a cocktail party where he met a stay-at-home mother who thought she was protected by common-law marriage because she'd lived for years with the children's father. "I said, 'Uh, uh, uh. You get yourself to an attorney right now and get yourself some kind of document.' "

It's also important to know that federal taxation treats unmarried partners and same-sex married couples less favorably than opposite-sex married couples in many ways. For starters, there's no unlimited marital deduction for asset transfers. "A spouse can leave \$1 or \$100 billion to their opposite-sex spouse without that amount becoming subject to estate or gift tax," says Hatfield Smith. In contrast, unmarried and same-sex married couples' tax-free transfers are limited to \$13,000 per year and \$1 million over a lifetime by the federal gift tax.

There are many more instances of unfavorable federal treatment. For example, if an unmarried couple owns a property as joint tenants with rights of survivorship, the entire value of the property may be included in the estate of the first to die, if there is inadequate documentation of the surviving partners' equal contribution to the property. States' tax treatment may be more favorable, but their tax bite is much lower than the federal government's. For instance, the maximum federal estate tax is 45%, versus 15% in Pennsylvania and 10% in Maryland.

There are non-tax financial penalties, too. For example, survivors cannot get Social Security based on their partners' earnings history. And because these couples are not legally wed,

it may be more difficult to obtain assets, ongoing support and access to a child after a relationship ends than it would be after a married couple divorces.

The drawbacks aren't only financial either. If one partner is disabled, the other may not be allowed access to that individual or to his or her medical records. Hatfield Smith recalls one man who had to go through his partner's estranged mother to receive medical information after his partner was hospitalized in a car accident. Deb Kinney, principal with the DLK Law Group in San Francisco, says unmarried opposite-sex couples can often "pass" as family at the hospital. That's less likely for same-sex couples.

#### TECHNIQUE CHECKUP

Financial planners who are familiar with certain estate planning techniques can ensure attorneys raise the right issues with these clients. Standard documents include a will, power of attorney, a healthcare proxy and a living will.

Because these couples lack spousal protections, probate is the last place they should be. "We want to avoid probate at all costs," Hatfield Smith says, since everything that goes into probate is contestable and therefore vulnerable to challenge by hostile family members. It also becomes public information. He recommends bypassing probate by using beneficiary designations for retirement accounts and life insurance; using transfer-on-death (TOD) accounts; and even using trusts and life insurance when they will ensure that assets go to the right people or, as with life insurance, pay for the higher estate taxes likely to be incurred by the unmarried individuals.

Advisors may think of trusts as the domain of the wealthy. But in the case of unmarried couples, these accounts can actually ensure that assets go to the right people and stay out of probate, Downey says. "They're not worthwhile if you have a few thousand dollars, but you don't have to be rich to use a trust." Hatfield Smith agrees: "For the unmarried community, trusts are almost always recommended."

Titling of assets should be undertaken cautiously as well. For example, when one partner adds another partner to a house title, he or she may create a gift-tax liability, says Joe Kapp, a financial planner with Lincoln Financial Advisors in Bethesda, Md.

Tissot recommends a domestic partnership agreement, which defines the scope of the relationship and what happens if the couple breaks up or dies. "It is like a contractual marriage," he says.

If the couple has children, a second parent adoption agreement is a good idea. About 10% of same-sex couples were raising children as of 1990. This rose to about one-quarter by 2000. "We have to adopt our children even if they are born into a relationship that's recognized by the state," Kinney says.

Planners should also note the potential advantages unmarried couples can enjoy. For instance, they can allocate itemized income tax deductions to the partner who will benefit the most from them. But don't let clients use two CPAs or they miss out, warns Hatfield Smith.

Sharon Rich, founder of Womoney in Belmont, Mass., points out another advantage: Loans between partners are not subject to IRS minimum interest rate requirements to avoid a loan being considered a gift. Also, in some ways, partners have more control over where their inheritance goes because their partners are not protected as spouses by state laws. States often dictate that a certain percentage of assets must go to a spouse, regardless of the individual's wishes. Unmarried partners have the option of bypassing their partners.

#### HANDING OFF THE PLAN

When it comes time to refer your client, don't assume a garden-variety estate planning attorney will suffice. Make sure lawyers are comfortable working with—and knowledgeable about the issues of—being unmarried, especially for same-sex couples, says John LeBlanc, founding principal of Back Bay Financial Group in Boston. As you would for any client, develop a referral network and tailor referrals to your clients' needs, personalities and budgets. And, as always, share your client knowledge with the attorneys you recommend.

Should partners use the same attorney? "I like to see two different attorneys because then you don't have a question of undue influence," Hatfield Smith says. "Undue influence is the biggest reason a will would be thrown out of court." If partners use the same attorney, he recommends the partners do not see the attorney on the same day and that they have a notary provide a self-proving affidavit, an extra level of documentation that makes it unnecessary for a will's witnesses to appear in court to prove its validity.

Lastly, review the documents that estate planning attorneys create for your clients. You may catch things attorneys miss. Also, many clients don't understand legal language. "Be sure that what's drafted is what [the client] wanted," Downey says.

Financial planners who ignore the estate planning issues of unmarried couples will subject them to the heartache of assets and relationships handled according to unfriendly laws. An active, informed planner can make a partner's death or disability less stressful because it's handled as the couple desires.

#### THE LEGALITIES

State-level recognition of marriages and civil unions for same-sex couples—and registered domestic partnerships for same-sex and opposite-sex couples—has made national headlines in 2009.

Vermont and Maine are scheduled to begin issuing marriage licenses for same-sex couples in September 2009. The highly publicized changes have a limited, although growing, impact on estate planning. State recognition typically means couples can take the marital exclusion from the state's estate tax. Details vary greatly from state to state, so it's important to check with a knowledgeable attorney.

Civil unions and domestic partnerships attempt to provide couples with some of the legal rights of marriage without using the word marriage, says Lara Schwartz, legal director, the Human Rights Campaign (HRC). Domestic partnerships aren't just for same-sex couples. In California, opposite-sex couples aged 62 and up can enter into a registered domestic partnership and retain eligibility for Social Security or Medicaid based on their federally unmarried status.

However, state recognition does not help with more onerous federal taxes. The biggest barrier to federal equality is the Defense of Marriage Act (DOMA), which defines marriage as a union between a man and a woman. If DOMA were repealed today, same-sex married couples would have the same rights as opposite-sex married couples, says the HRC's Schwartz. To track changes in relationship-recognition laws, visit [www.hrc.org/documents](http://www.hrc.org/documents).



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