

UNIQUE ESTATE PLANNING ISSUES FOR SAME-SEX OR UNMARRIED COUPLES

by Harlan S. Louis and Mary Jo Hudson

Despite the growing number of nontraditional families, including same-sex and unmarried opposite-sex couples (“nontraditional couples”), the estate planning, tax and probate laws do not recognize nontraditional couples. The laws simply treat nontraditional couples differently. Nontraditional couples have no rights under intestacy laws that control property transfers when there is no Will, and they do not get the unlimited estate tax marital deduction, possibly resulting in death taxes of about 50 percent. Therefore, without careful estate planning, the surviving partner of a nontraditional relationship will receive nothing from his or her partner upon their death. Additionally, the estate plan must consider the possibility of family resistance and assure that the estate plan can withstand potential challenges. Thus, estate planning for nontraditional couples presents complex legal issues.

1. The Importance of a Last Will and Testament

In most instances, if a married person dies without a Will, all of the assets pass to the surviving spouse. But in the same situation for a nontraditional couple, the surviving partner receives nothing. It is, therefore, vital that nontraditional couples designate their partners as beneficiaries in their Wills and other designations. Many times disapproving family members may challenge these Wills, so it is important to follow the legal formalities and take other protective actions, such as the following:

- **No Contest Clause.** If there is any possibility an interested person may contest the Will, include an *in terrorem* clause in the Will. Typically, this clause provides that a person contesting the Will will receive nothing. To be effective, the *in terrorem* clause should provide that the interested person receives a bequest so that person has something to lose if there is a Will challenge.
- **Periodically Update Will.** Periodic updates of the Will are a strong deterrent to anyone contemplating a Will challenge. Periodic updates of a Will, with similar provisions, signifies the testator’s continuing intent. A successful Will challenge may result in the prior Will being revived. Thus, numerous challenges may be necessary if there are numerous prior Wills.
- **Petition to Declare Will Valid.** Ohio law allows a person to petition the probate court for a judgment declaring their own Will valid while the person is still alive.
- **Use Pour Over Will.** If privacy is important, use a “pour over” Will, naming a trust as beneficiary, to protect the identity of the actual beneficiaries. Then the trust, a private document, directs the assets to the desired beneficiaries

2. Transfers of Assets Outside the Will and Tax Planning

Other transfers on death, including life insurance beneficiary designations, transfer on death deeds, and payable on death accounts, can be effective methods to transfer assets to a surviving partner. To be effective, the beneficiary designation must be done properly. If possible, the beneficiary designation should be witnessed by a disinterested third party, who could testify as to the designating party's intent and capacity. Trusts are also an excellent option for protecting a couple's privacy.

Trusts are also a good way to minimize taxes. Nontraditional couples may require some sophisticated tax planning, since an unmarried individual's estate does not qualify for the marital deduction. Some options are:

- **Charitable trusts**: may be used to provide funds to charity and an individual beneficiary.
- **Grantor retained income trusts**: not available for married couples under the tax laws, but effective for nontraditional couples, where each partner may receive a trust interest at different times.
- **Limited liability company or partnership**: these entities are used widely to pass assets to beneficiaries with significant tax benefits.

3. Planning for Incapacity.

Nontraditional couples should plan in advance for incapacity or medical emergencies. No Ohio or federal law currently requires a medical professional or hospital to recognize a nontraditional couple. In the absence of any of the following documents, blood relatives are the only individuals who are legally recognized as "family". As some nontraditional couples have unfortunately learned, the limited definition of family under the law can have dire consequences in the event of an emergency.

- **Power of Attorney.** The POA permits a person to act as an agent on the Principal's behalf, to sign their name on documents and handle business matters. It is important to have a POA naming the other life partner so that person can make financial and business decisions instead of other family members.
- **Health Care Power of Attorney.** The HCPOA designates a person to make medical decisions for the Principal when the Principal has lost capacity, such as a car accident rendering the Principal unconscious. The HCPOA is important where the life partner is the preferred decision maker. If no such document exists, the hospital might instead turn to biological family members.
- **Living Will.** The Living Will permits a person to express their wishes about withholding life sustaining treatment. The person may designate individuals who are to

be notified by the attending physician any time life sustaining treatment is to be withheld.

Planning for incapacity and death, everyone should have these essential documents. Because of the disparity in the laws, nontraditional couples need more intricate estate plans to meet their objectives.

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