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## MODERN LOVE, TIMELESS LEGACY: ESTATE PLANNING FOR ALL COUPLES

Modern families are complex and can consist of unmarried couples, married same-sex couples or couples in second marriages. These families may encounter unique estate planning challenges and may not always enjoy the same legal advantages, spousal rights, and tax benefits as others. For instance, couples who do not take the formal step of marriage under federal law may face limitations on estate and gift tax deductions. Also, in cases where a partner dies without a Will, state intestacy laws may not automatically grant inheritance rights.

Couples in second marriages may also require specific planning strategies to secure their accumulated wealth, future income, and provide for their children, particularly those from prior marriages.

All families should proactively address estate planning to safeguard against unintended consequences. With careful preparation, modern families can ensure their assets are distributed as intended, minimize transfer taxes, and align their end-of-life decisions with their wishes. Below, we discuss key factors that unmarried couples, married same-sex couples, and couples in second marriages should consider when crafting their estate plans.

### ESTATE PLANNING CONSIDERATIONS FOR UNMARRIED COUPLES

#### Avoiding Intestacy Laws

Numerous estate planning tools are available to individuals in committed relationships, irrespective of marital status, to protect against state laws that might unintentionally disinherit their partners. Wills, Revocable Trusts, and joint ownership can work in tandem to ensure that individuals can direct the distribution of their assets according to their wishes while safeguarding their surviving partners.

**Wills and Revocable Trusts.** Unmarried individuals in committed relationships should consider using Wills and, where appropriate, Revocable "Living" Trusts to ensure that their partners are recognized as beneficiaries of their estates. In addition, unmarried individuals may want to appoint their partners as fiduciaries of any estate planning vehicles they establish to ensure that their partners are authorized to manage their assets in the event of incapacity or death.

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**Joint Ownership.** Various forms of co-ownership, such as tenancy in common and joint tenancy with the right of survivorship, allow both married and unmarried partners to define the extent of their shared property interests. However, it is essential to be mindful of potential gift tax implications associated with these arrangements, as federal law does not grant the same marital deduction for transfers between members of unmarried couples (see discussion on gift taxes, below).

**Tenancy in Common (TIC).** Co-tenants may own different fractional shares of property, yet have the right to use the entire property. When a co-tenant dies, only that tenant's share will be included in his or her estate. In most states, unless a deed specifies otherwise, unmarried couples are assumed to take title as tenants in common. One drawback to this form of ownership is that a surviving co-tenant in a tenancy in common arrangement does not automatically succeed to the interest of the other co-tenant. Accordingly, upon the death of one co-tenant, that co-tenant's fractional share of the property could pass to someone other than the surviving co-tenant. This problem can be addressed by including appropriate provisions in each co-tenant's estate planning documents.

**Joint Tenancy with Right of Survivorship (JWROS).** Joint tenants with a right of survivorship each own an equal share of the property and have the right to possess the entire property. If one joint owner dies, the surviving tenant automatically becomes owner of the deceased tenant's share, thus bypassing the probate system and providing a relatively inexpensive and efficient means to transfer property upon death. To establish ownership in this manner, an unmarried couple must explicitly state their intention in the deed that they are joint tenants with right of survivorship in order to own real estate in this manner. However, this form of ownership comes with certain disadvantages, such as the potential inclusion of the entire fair market value of JWROS property in the decedent's estate if the surviving tenant cannot demonstrate their contribution to the property's acquisition. In addition, JWROS property may be susceptible to claims from the creditors of both tenants.

**Minimizing Transfer Taxes**

Federal law permits transfer tax-free transfers between spouses through the use of an unlimited marital deduction. Unmarried couples, on the other hand, cannot transfer assets back and forth without consideration of gift or estate tax consequences. Such individuals may want to consider various gifting strategies as a means of minimizing each partner's exposure to estate or gift tax. Individuals can utilize traditional lifetime gifting options, such as outright gifts and gifts to conventional irrevocable trusts, as well as family limited liability companies, family limited partnerships, and more sophisticated trust arrangements to minimize their tax liability when transferring assets to their partners.

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**Traditional Gifting Strategies.** Unmarried individuals can utilize federal and state gift tax exemptions and annual gift tax exclusions to make tax-free gifts to their partners or to trusts benefiting their partners. In 2023, federal tax law allows individuals to give away up to \$12.92 million during their lifetime without incurring any gift tax. Any federal gift tax exemption used during the donor's lifetime reduces the estate tax exemption available at the donor's death. The state-specific exemptions vary; for example, Connecticut's gift and estate tax exemption matches the federal exemption amount (\$12.92 million) and New York does not currently have a gift tax but does have a \$6.58 million estate tax exemption.

In addition, by using the annual gift tax exclusion, unmarried individuals may presently give up to \$17,000 to their partner and to an unlimited number of other individuals of their choosing, tax-free. They may also make unlimited direct payments of tuition or medical expenses for the benefit of whomever they like without using their annual gift tax exclusions or lifetime gift tax exemptions.

**Family Limited Liability Companies (FLLCs) and Family Limited Partnerships (FLPs).** Unmarried couples planning to own property together should consider forming an FLLC or FLP to own the property instead. The applicable operating or partnership agreement will then govern how the property will be managed, invested, and distributed, thus providing additional security to both partners in the event that one partner dies or the couple ends the relationship. While both structures offer a favorable single layer of taxation, if administered correctly, the FLLC structure has the added benefit of protecting the couple from any personal liability that might arise from ownership of the property.

When an FLLC or FLP structure is used, individuals may also be able to make gifts to their partners on a "discounted" basis, thereby reducing the property's value for gift tax purposes and removing some of the income and appreciation on the property from the donor partner's estate. However, caution should be exercised. The gift and estate tax status of FLLCs and FLPs has received greatly enhanced scrutiny from federal and state tax authorities in recent years. Furthermore, unmarried couples moving assets into an LLC or partnership may face income tax issues not present when the entity is established by a married couple.

**Sophisticated Trust Options.** Among the gifting strategies available to couples using trusts are *Irrevocable Life Insurance Trusts (ILITs)*, *Qualified Personal Residence Trusts (QPRTs)*, and *Grantor Retained Annuity Trusts (GRATs)*.

- An ILIT allows one partner to transfer life insurance for the benefit of the other partner free of federal estate tax. Furthermore, an ILIT can be structured so that any funds remaining in the ILIT at the death of the surviving partner can pass to the next generation of beneficiaries, tax-free. If properly structured, an ILIT can also be used as a repository for gifts utilizing the annual exclusion or even gifts utilizing the gift tax exemption.

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- A QPRT is a means for one partner to transfer a primary or vacation residence to the other partner on a highly discounted basis. The owner of the residence transfers the residence to a trust, retaining the right to use the residence for a set term of years. At the end of the term, the residence passes to the other partner or to a trust for their benefit. The value of the taxable gift is discounted to reflect the owner's retained right to use the residence for the term of years. As such, a QPRT can allow the couple to transfer residential property using the minimum amount of gift tax exemption.
- A GRAT is a way for one partner to transfer some of the growth in a financial asset to the other partner using little or none of the donor's gift tax exemption. The owner of the financial asset transfers the asset to a GRAT, retaining the right to an annuity payment for a set term of years. At the end of the term, the remaining trust assets pass to the other partner or to a trust for their benefit. The value of the taxable gift is equal to the original value of the asset transferred to the trust minus the discounted present value of the owner's retained annuity stream. Through proper drafting, a GRAT can be designed so that the taxable gift is near zero. As such, the GRAT can allow a partner to transfer the appreciation element of a financial asset to the other partner using little or no gift tax exemption.

The ILIT, QPRT, and GRAT are techniques available to all couples. Certain other techniques are only available, or are particularly well-suited, for unmarried couples. These include Grantor Retained Income Trusts ("GRITs"). Unmarried couples should consider utilizing GRITs to transfer property between themselves. When establishing a GRIT, the grantor (i.e., the creator of the trust) transfers property, preferably property that is appreciating in value but does not generate much income, such as undeveloped land or securities that do not pay dividends, into an irrevocable trust of which the other person is a beneficiary. The trust is required to pay any income earned from the trust property to the grantor for a defined number of years. At the end of that term, the trust property is distributed to the beneficiary. Because of certain tax laws designed to thwart certain preferential intra-family transfers, a GRIT produces no tax benefit for married couples. Likewise, a GRIT does not produce a tax benefit if the children of the donor are the beneficiaries of the trust. However, a GRIT can be a particularly useful technique for unmarried couples who want to transfer assets between partners on a highly tax-advantaged basis. The benefit of using a GRIT over other estate planning strategies depends on a number of factors, including, among other things, the applicable federal interest rates, the age of the grantor, the length of the trust term, and the grantor's available gift tax exemption.

*A complete discussion of LLCs, FLPs, ILITs, QPRTs, GRATs, and GRITs, and other sophisticated gifting strategies is beyond the scope of this Advisory. Those interested in these techniques should be sure to consult first with their professional advisers.*

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### **Incapacity and End of Life Decision Making**

Unmarried partners may utilize powers of attorney to authorize one another to manage their personal and financial affairs if either becomes incapacitated. Advance medical directives and HIPAA waivers may be used to ensure that partners are empowered to access each other's medical records and make critical decisions concerning their healthcare, including the withholding or withdrawal of life support in end-of-life situations. Partners may also want to make arrangements for the disposition of each other's remains. Individuals who have specific intentions regarding the disposition of their remains (e.g., cremation or burial in the family plot, ceremonies that should be performed) should articulate the details of such arrangements in writing.

### **Protecting Against Conflicts**

Even if unmarried partners prudently use wills, trusts, and other estate planning vehicles to ensure that their property is distributed according to their wishes, conflicts may arise to thwart those carefully laid plans. Family members who refuse to accept a couples' relationship may challenge their estate plan, alleging fraud, duress, undue influence, or a lack of capacity. It is often advisable for couples to plan ahead for these conflicts by executing cohabitation agreements, having "no contest" clauses in their wills and trusts, documenting evidence of their capacity, and confirming their intent with respect to non-probate transfers.

- **Cohabitation Agreements.** Cohabitation agreements, which are similar to prenuptial agreements (discussed below), may help resolve factual disputes by clarifying the partners' intentions regarding the distribution of their property. In such agreements, the parties should disclose the nature and value of their property, how expenses will be paid and by whom, how property will be divided in the event that the relationship dissolves, whether support obligations will continue after the termination of the relationship, and how property will be distributed at death. Such agreements should also address who will pay for debts upon the death of the first partner and, if there are additional beneficiaries, whether such debts will be allocated to such beneficiaries instead of to the surviving partner.
- **No Contest Clauses.** Sometimes family members may challenge a will or revocable trust that designates an unmarried partner as a beneficiary. In order to discourage such actions, these documents may include an "*in terrorem*" or "no contest" clause, which provides that any beneficiary who contests the will or revocable trust will forfeit their inheritance. Please note, in certain states like Florida, no contest clauses are not valid as of the date of this Advisory.

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- **Evidence of Capacity.** An attorney may separately interview a couple in the presence of disinterested witnesses to confirm that they were of sound mind when executing their estate plan, thus helping to overcome future claims of undue influence. An attorney may also obtain a statement of capacity from an individual's physician.
- **Intent of Non-Probate Transfers.** Family members may contest non-probate transfers from bank accounts, investment accounts, life insurance, and retirement accounts. Couples may help guard against such challenges by restating their beneficiary designations.

### ESTATE PLANNING CONSIDERATIONS FOR MARRIED SAME-SEX COUPLES

Same-sex couples who have a limited form of legal union, such as a municipal domestic partner registry, or who are not in any form of legal union are, from a legal perspective, in much the same position as any unmarried couple. Accordingly, such couples should review the estate planning considerations for couples in similar situations, discussed above, in addition to the considerations discussed in this section, which are primarily addressed to same-sex couples who are married.

#### Protecting Children

Same-sex couples face challenges concerning the legal parentage and inheritance of any children they raise together. In some situations, only one parent may have legally adopted a child. In other situations, a child is biologically related to one parent, as is often the case with children from prior relationships or children born through assisted reproductive technology, but is not biologically related to the other parent. In either case, the parent who has not adopted the child or who is not biologically related to the child may have no parental rights with respect to the child in the event that the adoptive or biological parent dies while the child is still a minor. Similarly, the child will not inherit from the non-adoptive or non-biological parent if that parent dies intestate. In the event the couple ends their relationship, the non-adoptive or non-biological parent may be denied custody or visitation rights.

**Guardianship.** A couple should consider appointing each other as Guardian of any minor children being raised by the couple. However, such appointments will not override the parental rights of a child's other legal parent in situations such as a child born of a prior relationship. A couple may also tailor Wills and Revocable Trusts to clearly identify the children being raised by the couple and to define "children" to include both children already born and after-born children (including any children born through assisted reproductive technology) with whom the testator will have a parental relationship, regardless of legal parentage.

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***Adoptions and Pre-Birth Orders.*** For the children of one but not both spouses (assuming there is no other legal parent), the couple may want to pursue a second parent or step-parent adoption of such children. For children that will be born through gestational surrogacy, the parents should consider obtaining a pre-birth order from a probate court ordering that the couple be listed as the child's parents on his or her birth certificate.

### **Minimizing Transfer Taxes**

A couple may use a variety of lifetime gifting strategies as a means to balance assets while minimizing gift and estate taxes for the donor spouse. Same-sex couples who are not married, including those in domestic partnerships and other civil unions, should consider the various gifting strategies outlined above with respect to unmarried couples.

## **ESTATE PLANNING CONSIDERATIONS FOR COUPLES IN SECOND MARRIAGES**

Couples in second marriages often find themselves facing unique challenges compared to their prior marital experiences. For example, one or both partners may have children from previous relationships, whose interests the couple wants to protect in the event of divorce or the passing of one of the partners. In addition, each partner has likely accumulated more assets and may be earning a higher income than in their earlier marriage. One or both partners may have gone through a divorce, and the couple may want greater certainty and predictability regarding the division of property and potential support obligations in the event of another divorce.

### **Protecting Against Divorce**

***Prenuptial and Postnuptial Agreements.*** Couples who are contemplating a second marriage but have not yet married should consider entering into a prenuptial agreement to clearly establish each party's property rights in case of separation or the passing of a spouse. Couples who have already entered into a second marriage, but who did not negotiate a prenuptial agreement, may still enter into a postnuptial agreement. Couples who have entered into either a prenuptial or postnuptial agreement should ensure that their estate planning documents incorporate the relevant provisions of the agreement.

### **Protecting Children**

***Wills and Revocable Trusts.*** Couples in second marriages should consider bequeathing property to a marital trust for the benefit of the spouse, rather than to the spouse outright, with the remainder of the trust passing to the decedent's children.

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### RESOURCES

Advisory  
**GRATs – Grantor  
Retained Annuity Trusts**

Advisory  
**Qualified Personal  
Residence Trusts**

Advisory  
**Key Considerations  
in Estate Planning for  
LGBTQ+ Individuals  
and Couples**

Advisory  
**Enforcement of a  
No-Contest Clause**

Advisory  
**Prenuptial Agreements**

Podcast  
**The Estate Plan Audit:  
Addressing Changes in  
Assets, Relationships  
and Taxes**

**Retirement Accounts.** Moreover, to the extent the surviving spouse will have sufficient assets, the couple may want to consider designating their children (either outright or in trust) as the beneficiaries of their respective retirement accounts. This strategy will tend to lower the amount of required minimum distributions that must be taken from such accounts, thus continuing the deferral of income taxes.

### Minimizing Transfer Taxes

**Lifetime Qualified Terminable Interest Property Trusts.** In addition to other lifetime gifting strategies that may be used to balance assets, a wealthier spouse, as grantor, may establish a lifetime marital trust for the benefit of the less wealthy spouse during their lifetime. (Such trusts are often referred to as Qualified Terminal Interest Property trusts (“QTIPs”).) By doing so, the grantor avoids any gift taxes on the transfer, excludes the transferred property from the grantor’s estate, and causes the property to be included in the spouse’s estate instead, thus potentially avoiding estate tax on the transferred property by taking advantage of the spouse’s estate tax exemption. The grantor, by virtue of creating the trust, maintains control over the distribution of assets upon the spouse’s death, such as by providing that the grantor’s children become the beneficiaries instead of the spouse’s children.

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Though modern couples face many unique challenges, they have a wide range of estate planning strategies to choose from. They can put plans in place that aide in (i) distributing their assets as they intend, (ii) minimizing gift and estate taxes, and (iii) outlining critical decisions concerning their finances and healthcare, including appointing trusted individuals during either partner’s incapacity. The choice of which strategies to employ in a particular situation, as well as their timing and execution, is a complicated matter that requires careful analysis. Individuals and couples should consult with their Wiggin and Dana attorney to consider the facts and circumstances relevant to their situations before pursuing any of the strategies outlined above.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*