

## Special Considerations in Estate Planning for Same-Sex and Unmarried Couples

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### INTRODUCTION

Until June of 2013, the Tax Code regarded both unmarried partners and partners whose marriages are not recognized for purposes of federal law as “legal strangers.”<sup>1</sup> In 1996, Congress passed the Defense of Marriage Act (DOMA).<sup>2</sup> Prior to the 2013 Supreme Court ruling *United States v. Windsor*,<sup>3</sup> Section 3 of DOMA mandated that, for purposes of federal law, the term “marriage” would only define the legal union between a man and a woman, and that “spouse” would mean only a person married to someone of the opposite sex.<sup>4</sup> In *United States v. Windsor*, the Supreme Court found DOMA’s definition of “marriage” and “spouse” to be unconstitutional. Since marriage is a matter of state law, the IRS typically followed state law to determine whether a couple was married for purposes of the Internal Revenue Code.<sup>5</sup> However, in the aftermath of the *Windsor* decision, the IRS issued a ruling indicating that it would recognize all validly performed same-sex marriages as marriages for purposes of the IRC, regardless of whether the couple’s state of domicile recognized same-sex marriages.<sup>6</sup>

Although same-sex marriages will be recognized by the IRS for purposes of federal taxes, couples who have validly-performed same-sex marriages, but who live in states that do not recognize same-sex marriages will not be considered married in their state. Married couples receive many tax and civil benefits simply for being married.<sup>7</sup> Unmarried couples and couples whose marriages are not recognized by their state of domicile are not privy to these same benefits.<sup>8</sup>

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1. Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 506-07 (2009); Sverre David Roang & Brian T. Larson, *Life Partners, Legal Strangers: Estate Planning for Unmarried Couples*, 79 WIS. LAW., Nov. 2006, 18, 60-61, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=79&Issue=11&ArticleID=1120>.

2. Defense of Marriage Act (DOMA), 1 U.S.C.A. § 7 (West 2013), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

3. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

4. *DOMA supra* note 2.

5. Cain, *supra* note 1, at 504.

6. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

7. Wendy S. Goffe, *Planning for Non-Traditional Couples*, SS043 ALI-ABA 859, 863 (2011).

8. These rights include rights to handle funeral arrangements, rights under intestacy, and other survivor benefits. *Id.*

Although same-sex couples may now take advantage of tax devices such as gift splitting, portability, and the gift and estate tax marital deduction,<sup>9</sup> they may still be unable to take advantages of other opportunities, economic and otherwise, available to other married couples. For example, many state have “default” rules in place to protect rights of surviving family members when a relative passes away. Usually, these same default rules do not serve to protect unmarried partners or same-sex married partners in states that do not recognize same-sex marriages, regardless of how intertwined their lives or finances may be.<sup>10</sup> The rationale behind many of these default rules is to ensure that surviving family members do not become wards of the state when their family members die.<sup>11</sup> However, although marriage may have once served as a reliable proxy for mutual economic dependence, marital status is no longer the best indicator of how people share money today, and married partners are not the only couples to be financially dependent on one another.<sup>12</sup> If a policy goal of these default rules is to ensure surviving spouses are not left without a means to support themselves once their partner dies, extending these default rules to unmarried couples would be a positive policy change. Some states have started to extend such default rules to unmarried couples, but there remains a significant lack of state-to-state consistency, making it difficult for same-sex married couples and unmarried couples to maintain consistency as they relocate.<sup>13</sup>

Family dynamics in the western world are evolving, and how people define their own family is no longer consistent with the “families” that many states recognize.<sup>14</sup> Although some states might not be keeping up with changing family dynamics, there are various ways that people who choose not to marry or whose marriages are not recognized in certain states can preserve their wealth while ensuring that their wealth stays in the hands of their loved ones.

Estate planning is necessary for all couples, but is particularly important for unmarried couples and couples whose marriages are not recognized in all states, as these couples may not necessarily be able to rely on default rules protecting their interests in their spouse’s property. While estate planning can be stressful and emotional for married couples, these factors can be amplified to an even greater degree for unmarried couples. Couples whose marriages are not recognized may see the joint planning of an estate as a validation of the seriousness of their relationship.<sup>15</sup> For other couples, however, estate planning could have added stress, especially if the couple desires to keep the nature of

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9. See I.R.C. § 2056 (2012) (bequests to surviving spouse); I.R.C. § 2523 (2012) (gifts to spouse); I.R.C. § 2513 (2012) (gift splitting).

10. Wendy Richards, *An Analysis of Recent Tax Reforms from a Marital-Bias Perspective: It is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 613–64 (2008).

11. See MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 34–35 (2004) (“It is the family, not the state or the market, that assumes responsibility for inevitable dependency.”).

12. Richards, *supra* note 10, at 614).

13. See *infra* notes 26–30.

14. See Richards, *supra* note 10, at 617 (“It is now more common for couples to create a family while unwed.”).

15. Maureen H. Monks, Angela M. Ordonez, Donna M. Turley, & Peter F. Zupcofska, *Estate Planning for Nontraditional Families*, in *A PRACTICAL GUIDE TO ESTATE PLANNING IN MASSACHUSETTS* (Jon E. Steffensen ed., 3d ed. 2011).

their relationship private. As a result of these additional concerns and because unmarried couples are not entitled to various tax benefits or default provisions, their estate plans must be handled with heightened sensitivity as well as creativity.

### I. ETHICAL CONSIDERATIONS

When representing more than one individual, married or otherwise, a lawyer is likely approaching territory where his clients might have adverse interests.<sup>16</sup> This reality is particularly salient in estate planning. Situations where the partners have children from previous relationships, where one partner has substantially more wealth than the other partner, or where both partners have substantial wealth can be especially ethically complex.

There are various types of representation available to couples in estate planning. In some instances, it may be most appropriate that each partner have their own attorney representing their own interests.<sup>17</sup> This could be the case for both married couples and unmarried couples. If a lawyer has reason to be concerned about a couple's seriousness towards one another, or the longevity of their relationship, it may be beneficial to suggest they each retain their own counsel.<sup>18</sup> Even if a couple decides to have a single lawyer draft all of their estate planning documents, it may be advisable that each partner have an independent lawyer review the documents, to make sure that each partner's interests are being adequately represented.<sup>19</sup>

However, many couples wish to plan their estate together, as a unit. For couples who cannot marry, estate planning as a couple may symbolize an affirmation of their relationship.<sup>20</sup> Some jurisdictions adopt the rule that joint representation is appropriate when it will result in "more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all the relevant family and property considerations."<sup>21</sup> Other jurisdictions allow a lawyer to represent more than one client if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."<sup>22</sup> The American Bar Association Model Rules of Professional Conduct, which many states adopt in full or in part, take the position that a lawyer may not represent a client if the lawyer's responsibilities to one client materially limit the lawyer's ability to represent another client.<sup>23</sup> However, the ABA clarifies that lawyers can generally ethically represent a single couple comprised of two partners in an estate planning setting, provided both parties give informed consent and the lawyer explains any potential conflicts of interests that may arise.<sup>24</sup> Therefore, it is advisable that

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16. Roang & Larson, *supra* note 1, at 20.

17. Goffe, *supra* note 7, at 866.

18. *Id.*; Monks et al., *supra* note 15.

19. Goffe, *supra* note 7, at 866-67.

20. Monks et al., *supra* note 15.

21. *See, e.g.*, MASS. R. PROF'L. CONDUCT. § 1.7 (2013); TENN. CODE ANN. § 1.7 (2011).

22. FLA. STAT. ANN. BAR R. 4-1.7 (West 2013).

23. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

24. *Id.* at cmt. n. 27.

lawyers explain any potential conflicts of interest that may arise in the context of estate planning to their clients, and obtain their clients' consent in writing.<sup>25</sup>

Some jurisdictions recognize that issues may arise in the context of joint representation that require the lawyer to withdraw from the representation of both parties. One such issue concerns private disclosures one partner makes to a lawyer who is jointly representing both partners. Such disclosures are sometimes called "separate confidences," and put lawyers in a difficult ethical position. Both courses of action lawyers could take in this situation (either disclosing the separate disclosure to the other partner failing to do so) could result in a violation of an ethical rule.<sup>26</sup> Informing the other partner of the separate disclosure could violate confidentiality rules, while failing to inform the other partner of the separate disclosure could violate communication rules.<sup>27</sup> Some states mandate that attorneys faced with this conflict withdraw from representing *both* partners.<sup>28</sup> Therefore, it is particularly important for lawyers who decide joint representation is appropriate to inform both parties of potential conflicts of interest, and to act quickly and diligently if such a conflict arises.

## II. WILLS

There are many "default" rules in place to protect surviving spouses when one spouse dies. Surviving spouses' interests in a decedent spouse's estate are more or less protected in the event that the decedent spouse dies intestate. The spouse of an intestate decedent generally has the right to at least a portion of the decedent's estate, and receives this portion free of estate tax.<sup>29</sup> However, this intestate succession default provision generally either applies to unmarried couples to a lesser extent, or not at all.<sup>30</sup> Therefore, it is important that unmarried partners establish a will.<sup>31</sup> This is equally important for couples in same-sex marriages. If a same-sex married couple moves to a state that does not recognize same-sex marriage, they might not have the benefit of the same intestate

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25. See *id.* (establishing the need for informed consent and the consequences for the representation if conflicts arise during the negotiation).

26. See, e.g., Fla. State Bar Comm. on Prof'l Ethics, Op. 95-4 (1997), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2095-4>; Hollis F. Russell & Peter A. Bicks, *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, 72 FLA. B. J. 39, 40 (1998).

27. Russell & Bicks, *supra* note 26, at 40.

28. *Id.* at 41.

29. See e.g., N.C. GEN. STAT. ANN. § 29-14 (West 2012) (providing a surviving spouse at least 1/3 of the real property and 1/3 plus \$60,000 of the personal property of a decedent spouse who dies intestate). *But see* CAL. PROB. CODE §§ 37, 6401 (West 2012) (conferring similar rights on a surviving domestic partner when one partner dies). However, spousal rights under intestate succession are greater than a domestic partner's rights in California; spouses get all property left behind by the decedent; domestic partners are only entitled to the entire estate if the decedent left no surviving issue, parent, brother, sister, etc. North Carolina is an example of a state that does not provide intestate succession rights to domestic partners. These rights are only granted to a surviving spouse. I.R.C. §§ 2523, 2056 (2012) (a spouse receives the estate free of tax provided the couple is an opposite-sex married couple).

30. I.R.C. §§ 2523, 2056 (2012).

31. Frank S. Berall, *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 QUINNIPIAC L. REV. 361, 387 (2004).

succession rules they would be entitled to while living in a state that recognized same-sex marriages.<sup>32</sup>

The property rights of unmarried partners can also be protected in the event of dissolution of the relationship. One way this can be done is with a “cohabitation agreement.” This type of agreement can show that unmarried couples have agreed as to how property will be distributed if the relationship ends.<sup>33</sup> Cohabitation agreements will be discussed in the following section.

#### A. Preparing for the Will to be Challenged

In many states, when a married couple divorces, provisions in an individual’s will and other estate planning documents which affect the former spouse are automatically revoked.<sup>34</sup> This is another example of a “default rule” that applies only to married couples.<sup>35</sup> The revocation of a former unmarried partner’s interests in wills and other estate planning documents may not be as straightforward. Therefore, as with any client, it is particularly important to make sure that all wills are up to date for clients who may be in more legally informal relationships. This includes ensuring that all beneficiaries are named accurately, and that no outstanding wills or estate planning documents that a former partner could use to challenge a current will or estate planning document exist.<sup>36</sup> This generally requires changing any prior wills that a client may have made, since there are few events in the life of a person who has never been married that would trigger automatic revocation.

If a person dies testate, or with a will, most states permit “interested” parties to challenge the will’s validity.<sup>37</sup> An “interested party” generally includes relatives of the decedent or persons named in the decedent’s will.<sup>38</sup> Wills must be approved through probate, which can be problematic for certain unmarried couples. Probate records tend to be public; for couples who desire to keep the nature of their relationship private, probate can publicize a relationship in an undesirable way.<sup>39</sup> This can be avoided with devices that avoid probate, as well as “pour over” provisions, which name a trust as a beneficiary, instead of the partner.<sup>40</sup> Using trusts as estate planning tools will be discussed in the following section.

Although naming a trust as a beneficiary, instead of the decedent’s partner,

32. Meghan V. Alter, *The High Price for Leveling the Playing Field: The Economic Divide in Estate Planning for Same-Sex Couples*, 25 QUINNIPIAC PROB. L. J. 32, 48–49 (2011).

33. Roang & Larson, *supra* note 1, at 61.

34. See e.g., N.C. GEN. STAT. ANN. § 31-5.4 (2012) (divorce does not revoke the entire will automatically, but revokes all provisions in favor of the former spouse); CAL. PROB. CODE § 6122 (West 2012) (divorce revokes many provisions in favor of a former spouse); FLA. STAT. ANN. § 732.507 (West 2007) (divorce makes provisions that affect former spouse void).

35. Roang & Larson, *supra* note 1, at 20.

36. *Id.*, at 21.

37. Susan L. Racey, *Estate Planning Techniques for Nontraditional Couples*, 14 OHIO PROB. L. J. 57, at \*1 (2004).

38. See, e.g., FLA. STAT. ANN. § 731.01 (West 2012); CAL. PROB. CODE § 1043 (West 2012) (interested persons may contest a will).

39. Racey, *supra* note 37, at \*1.

40. *Id.*

maintains the couple's privacy, it will not prevent relatives and other interested parties from attempting to contest the will. One way to deter a will contest is with a "no contest" clause. Some states will permit such a clause, but some will not.<sup>41</sup> "No contest" clauses can be structured so that anyone who chooses to contest a will loses whatever bequest they were entitled to in the will. However, such a clause would only prevent someone who is named in the will, who has something to lose, from contesting the will.<sup>42</sup> Other interested parties who are not named in the will would not be deterred from contesting the will. Such interested parties could contest the will out of spite or genuine confusion about why the decedent would leave assets to a particular person. This could be especially relevant if the decedent's relationship with his or her partner was secret.

Another way to deter will contests is to take steps to ensure the will appears to have been as validly constructed as possible. This can be accomplished in a few ways. First, periodically updating the will can be helpful.<sup>43</sup> As the couple's financial situation changes and as the couple acquires new assets, a testator can update the will periodically, while always leaving significant assets to his or her partner.<sup>44</sup> This provides evidence of the testator's intent. The more the testator updates his will but continues to leave significant assets to his partner, the more evidence there is of his unyielding intent to leave assets to his partner. This makes the testator's intent seem constant and unwavering. Second, maintaining standard procedures during the will-drafting process, such as reading standardized instructions to the testator at each drafting, might serve to convince challengers that the will was drafted in a sound manner.<sup>45</sup>

Additionally, special care should be taken to ensure that all beneficiaries named for all non-probate transfers are named accurately.<sup>46</sup> It is also advisable to suggest that testators in unmarried relationships specifically name all relatives who will *not* be receiving anything in the will. This can serve as evidence demonstrating that the testator knew about the existence of these relatives, and speaks to his intent to leave them out of his will.<sup>47</sup>

Competency concerns are nearly always relevant to will creation. One way to avoid a contest on the basis of competency is to draft the will as early as possible in the testator's life, when competency is less of an issue.<sup>48</sup> However, it is probably not best to rely on merely drafting the will early in a testator's lifespan, especially if part of the estate planning strategy is to update the will periodically. Therefore, obtaining evidence of the testator's competency might also be

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41. See e.g., MASS. GEN. LAWS ANN. ch. 190B, § 2-517 (West 2012) ("A provision in a will purporting to penalize an interested person for contesting the will . . . is enforceable."). *But see* FLA. STAT. ANN. § 732.517 (West 2012) ("A provision in a will purporting to penalize any interested person for contesting the will . . . is unenforceable").

42. Racey, *supra* note 37, at \*1.

43. *Id.*

44. *Id.*

45. Goffe, *supra* note 7, at 949-50.

46. Roang & Larson, *supra* note 1, at 20.

47. Racey, *supra* note 37, at \*2.

48. *Id.*

advisable.<sup>49</sup> Mental health professionals and primary care providers can provide convincing and credible evidence as to a testator's capacity at the time of a will-drafting.<sup>50</sup> Attorneys may also add to competency evidence by keeping detailed notes of the will-drafting process.<sup>51</sup> It may also be advisable to arrange for a witness to be present during these meetings who would be able to testify as to the competency of the testator in an articulate and convincing way.<sup>52</sup>

### III. COHABITATION AGREEMENTS

It is common to encourage traditional couples to sign a prenuptial agreement prior to their marriage as part of a wealth management plan, especially in situations where at least one partner has an above-average net worth or earning potential. Prenuptial agreements can serve to delineate the property and other rights each partner will be entitled to in the event of the dissolution of the marriage. While this same device is not available to couples who do not or cannot marry, similar agreements, such as cohabitation agreements or domestic partnership agreements, can serve the same important purpose.<sup>53</sup> Both agreements in the anticipation of a marriage (prenuptial agreements) and those in anticipation of a relationship that may never become a marriage (cohabitation agreements) may address important estate planning issues, such as control, management, or ownership of any current or future financial assets or dealings, and can provide a plan for what happens to various assets in the event the relationship ends.<sup>54</sup>

Some estate planners suggest that cohabitation agreements include disclosure of assets and liabilities, allocation of expenses while living together, a definition of "termination of relationship," dispute resolution, and an additional section outlining choice of law issues.<sup>55</sup> Cohabitation agreements should address questions regarding how finances will be handled, including whether the couples will share a bank account or have separate bank accounts.<sup>56</sup> These agreements could also establish which partner will be responsible for routine and non-routine expenses, as well as who will own particular assets.<sup>57</sup> Like a prenuptial agreement, a cohabitation agreement should also provide a plan for what happens at the dissolution of the relationship.<sup>58</sup> Since marriages typically end in divorce, there is generally no need to define what constitutes a termination of the relationship. This is not true for unmarried couples, and it may be beneficial to define what will constitute a "separation" or "termination," how those will differ, and how each will be handled in terms of distributing

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49. Goffe, *supra* note 7, at 948-49.

50. THE AMERICAN PSYCHIATRIC PUBLISHING, TEXTBOOK OF FORENSIC PSYCHIATRY 227-33 (Robert I. Simon & Liza H. Gold eds., 2d ed. 2010).

51. Goffe, *supra* note 7, at 948-49.

52. *Id.*

53. Roang & Larson, *supra* note 1, at 61-62.

54. *Id.*

55. Goffe, *supra* note 7, at 898-902.

56. Roang & Larson, *supra* note 1, at 61-62.

57. *Id.*

58. Goffe, *supra* note 7, at 898. (CT 16.7.7)

assets.<sup>59</sup> Importantly, whether cohabitation agreements are enforceable varies by state. For example, some states require that couples entering into a cohabitation agreement fully disclose all financial assets and liabilities as a fairness requirement.<sup>60</sup> Therefore, in addition to including the components relevant to the couple, cohabitation agreements should also be in compliance with state law.

When creating a cohabitation agreement, it is important to ensure that all procedural and substantive fairness requirements are met. While some courts may view cohabitation agreements merely as a contract, there are certainly reasonable arguments for holding cohabitation agreements to the same stringent standards as prenuptial agreements.<sup>61</sup> For example, the American Law Institute suggests using both procedural and substantive fairness requirements when analyzing the validity of cohabitation agreements, including whether each party had the opportunity to access to their own counsel as well as whether the agreement was executed at least thirty days before it would go into effect.<sup>62</sup> Therefore, it is important to ensure that all state-mandated fairness requirements are met so that the agreement can be enforced.

Many states have public policy concerns regarding cohabitation agreements. Although prenuptial agreements are contracts, consideration, or an exchange, is generally not required to find the prenuptial agreement valid.<sup>63</sup> However, many states *are* concerned about what type of consideration is exchanged in cohabitation situations.<sup>64</sup> For example, many states are concerned with whether these agreements are based on “meretricious” consideration (prostitution), a form of consideration which would clearly go against the public policy of many states.<sup>65</sup> However, provided the contract is not “inseparably based upon illicit consideration of sexual services,” the consideration will likely not be an issue.<sup>66</sup> For example, states have held that a cohabitation agreement to “pool income, acquire assets and share in accumulations” has adequate, non-meretricious consideration.<sup>67</sup> Additionally, other states have held that promises to perform homemaking services could be valid consideration.<sup>68</sup>

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59. *Id.*

60. *Id.* at 898.

61. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.04 (2002) [hereinafter PRINCIPLES] (outlining the procedural requirements for an enforceable agreement).

62. *Id.* at § 7.04(3).

63. See, e.g., FLA. STAT. ANN. § 732.702 (West 2002) (stating that no consideration is required for prenuptial or marital agreements); UNIF. PREMARITAL AGREEMENT ACT § 2 (1983) (stating that prenuptial agreements are enforceable without consideration).

64. See e.g., *Posik v. Layton*, 695 So. 2d 759, 761–62 (Fla. Dist. Ct. App. 1997) (“[E]ven though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this kind of agreement. . . . [A]n agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services. . . . [The contract would be invalid] if it could be determined from the contract or from the conduct of the parties that the primary reason for the agreement was to deliver and be paid for sexual services.”); *Cook v. Cook*, 691 P.2d 664, 669 (Ariz. 1984) (holding that cohabitation agreement did require separate, non-meretricious consideration, and that pooling income, acquiring assets, and sharing in the accumulations was adequate consideration).

65. *Cook*, 691 P.2d at 669; *Posik*, 695 So. 2d at 762.

66. *Posik*, 695 So. 2d at 760.

67. *Cook*, 691 P.2d at 669.

68. See e.g., *Marvin v. Marvin*, 557 P.2d 106, 119 (Cal. 1976) (noting the unfairness of common



When counseling clients, it is important to explain the shifting climate of family law. While it may seem like partner support obligations (like alimony) only occur at the dissolution of a legal marriage, this may not be the case in every state. Rights to support can be established by contract, and these contracts can be implicit<sup>69</sup> as well as explicit.<sup>70</sup> Therefore, any cohabitation agreement should address partner support, just as a prenuptial agreement would.<sup>71</sup>

#### IV. USEFUL ESTATE PLANNING DEVICES

There are various devices unmarried couples can utilize for estate planning purposes. Use of certain trusts may be even more attractive to unmarried partners than they would be for family members, as, in some cases, assigning remainder interests in a trust to family members can effectively cancel out the tax benefits of the arrangement because of valuation rules.<sup>72</sup> These benefits are not canceled out for unmarried partners, since they are considered “legal strangers” under the Tax Code.<sup>73</sup> Many devices unmarried couples can utilize also avoid probate, which is advantageous because it can help a couple maintain privacy, and may also make these transactions more difficult to contest than a will.<sup>74</sup> Importantly, legally-married same-sex couples cannot take advantage of devices created by the Tax Code that are unavailable to married couples, since the IRS now recognizes legally married same-sex couples as spouses.<sup>75</sup>

##### A. Equalization Tools

Married couples can avoid gift tax when they transfer property to their spouse. Surviving spouses do not have to pay estate tax on their spouse’s estate when their spouse dies,<sup>76</sup> and transfers that spouses make to one another are not subject to the gift tax.<sup>77</sup> Unmarried couples, on the other hand, are unable to take advantage of devices such as the unlimited marital deduction,<sup>78</sup> gift splitting,<sup>79</sup> and portability.<sup>80</sup>

Many couples attempt to “equalize” their estates to the greatest extent possible as part of their estate plan. This is done to take advantage of each partner’s unified credit, and helps ensure that each partner’s estate is subject to

law doctrine that a “nonmarital partner who rendered services in the absence of express counteract could assert no right to property acquired during the relationship”).

69. *Id.* at 110 (holding that there theoretically could have been an oral contract for property distribution or support in an unmarried couple).

70. *See e.g., Posik*, 695 So.2d at 760 (holding that, due to the risk of abuse in contracts made upon consideration of marriage, such agreements must be in writing).

71. Roang, *supra* note 1, at 61–62; PRINCIPLES, *supra* note 61 at § 6.03(7).

72. I.R.C. § 2702(4) (2012); Roang & Larson, *supra* note 1, at 21.

73. Roang & Larson, *supra* note 1, at 21.

74. *Id.* at 20–21.

75. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (2013) (holding that “spouse” refers to an individual in a same-sex relationship who is legally married under state law).

76. I.R.C. § 2056 (2012).

77. I.R.C. § 2523 (2012).

78. I.R.C. §§ 2056, 2523 (2012).

79. *Id.* § 2513; Racey, *supra* note 37, at \*4.

80. I.R.C. § 2056 (2012).

as little estate tax as possible. However, these techniques generally require partners to transfer assets to one another, and transfers of items or money to an unmarried partner may be subject to gift taxation. Similarly, transferring property to an unmarried partner may also be subject to the gift tax, since the same-sex marriages are not recognized for purposes of federal law, such as the Tax Code. For example, adding an unmarried partner's name to a property deed is technically a gift, as is purchasing a home as a joint tenancy.<sup>81</sup> Additionally, if a home is jointly owned, but only one partner pays the mortgage, there could be a gift tax liability.<sup>82</sup>

Gift tax liability may be able to be avoided by transferring assets for adequate consideration.<sup>83</sup> While virtually anything except meretricious consideration would likely be considered adequate consideration for a cohabitation agreement, both estate and gift tax require transfers be made "for adequate and full consideration in money or money's worth,"<sup>84</sup> "love and affection do not constitute adequate and full consideration for tax purposes."<sup>85</sup> The consideration should be documented in writing. This can be done in a cohabitation agreement, or in a separate contract. Keeping meticulous records of each partner's contributions to joint property may also be helpful; this way, each joint purchase is not seen as a gift, but as an expenditure to which each partner contributed.<sup>86</sup>

The annual exclusion can also help with "equalization" of estates.<sup>87</sup> An unmarried partner can give the full annual exclusion amount to his partner in the form of a gift. This grows the donee-partner's estate while reducing the donor-partner's estate. Additionally, the transfers will not be subject to gift tax liability.<sup>88</sup> Since courts generally find that family consumption expenses are exempted from the gift tax, and have extended such exemptions to friends as well as family, unmarried partners may be able to provide incidental expenses for their partners, while still utilizing the full annual exclusion.<sup>89</sup> However, for partners who wish to give their significant other substantial incidental gifts throughout the year, it might be safer not to gift the full annual exclusion amount in cash, so as to avoid making the donor appear as if he is "double-dipping."<sup>90</sup> The annual exclusion was created so taxpayers would not have to keep track of

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81. Roang & Larson, *supra* note 1, at 59.

82. *Id.*

83. *Id.* at 60.

84. Estate of Bernard Shapiro v. United States, 634 F.3d 1055, 1059 (9th Cir. 2011) (internal quotations omitted).

85. *Id.* at 1063.

86. I.R.C. § 2514 (2012); see Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 375 (1995) ("To the extent the net transfer from the greater income earner to the lower income earner is viewed as being paid in consideration for the lower income earner's love, emotional support, or other services upon which a monetary value may not be placed, the transfer is a gift. The services are not an obligation that can be valued in "money's worth").

87. I.R.C. § 2503 (2012); Racey, *supra* note 37 at \*4.

88. I.R.C. § 2503 (2012).

89. BORIS BITTKER, ELIAS CLARK, & GRAYSON M.P. MCCOUCH, FEDERAL ESTATE AND GIFT TAXATION, 53 (10th ed. 2011).

90. *Id.* at 143 (noting that while some estate planners advise that the annual exclusion can be utilized in addition to other incidental gifts, they may be skating on "thin ice")

the incidental gifts they give to any one person throughout the year, provided those gifts do not exceed a specified amount.<sup>91</sup> Therefore, it might be risky to transfer both the entire annual exclusion amount in cash *and* provide lavish gifts throughout the year and not file a gift tax return.

Some equalization tools unavailable to married couples may be available to unmarried couples. For example, individuals may not claim losses on sales of property to “members of a family.”<sup>92</sup> Married partners, as “members of a family” for the purposes of this provision, are prohibited from selling property to one another and claiming a loss.<sup>93</sup> However, since unmarried partners are legal strangers, unmarried partners may sell stock or other property to one another for adequate consideration. This transaction could be mutually beneficial for the buyer and the seller; the buyer’s basis would be the purchase price, and the seller would be able to recognize a loss, if one exists.<sup>94</sup>

Unmarried partners may also use installment sales to transfer assets. One partner may sell a piece of property to the other partner for a promissory note, secured by the property, in which the buying partner pledges to pay for the asset over a period of time. This transaction allows an asset to be transferred to the less wealthy partner for adequate consideration.<sup>95</sup> The selling partner may even be able to forgive the note in their will at death, potentially avoiding gift tax. The same type of transaction could be established with a private annuity.<sup>96</sup> It should be noted that anyone who engages in this type of transaction should be careful to ensure adequate consideration is given for these transfers.

Unmarried couples can also take advantage of the § 2503(e) “Meds and Eds” exclusions.<sup>97</sup> Under this provision, an individual can pay for anyone’s qualified tuition costs and medical expenses, provided the costs are paid directly to the provider of the services, not to the individual benefiting from the services.<sup>98</sup> Although this benefit is limited and will likely not provide a huge tax benefit for a couple, this is a way that unmarried partners can provide tax-free financial assistance to their partner’s family members or other loved ones.

## B. Use of Trusts

Trusts have the advantage of being more difficult to set aside than wills, and can also avoid probate.<sup>99</sup> For this reason, trusts may address privacy concerns of unmarried couples. This would give the grantor’s surviving partner control of the trust upon the grantor’s death. Additionally, trusts can be named beneficiary of certain assets which require a beneficiary, such as retirement accounts.<sup>100</sup> Provided the grantor’s partner is a beneficiary of the trust, naming

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91. S. Rep. 665, 72d Cong. (1932).

92. I.R.C. § 267 (2012).

93. *Id.*

94. Goffe, *supra* note 7, at 930.

95. *Id.*; I.R.C. § 453 (2012).

96. Goffe, *supra* note 7, at 930.

97. I.R.C. § 2503(e) (2012).

98. *Id.*

99. Racey, *supra* note 37, at \*2.

100. *Id.*

the trust beneficiary of these assets permits the surviving partner to access the assets after the grantor's death without having to be named as beneficiary.

Revocable trusts have one main advantage: flexibility. Revocable trusts allow a grantor to provide a beneficiary with meaningful rights and access to assets while still retaining vast rights to revoke or amend the trust and any trustees until death or incapacity. For example, if a couple's relationship is private, a grantor may name himself initial trustee and his partner successor trustee in the event of the grantor's death or incapacity.<sup>101</sup> Revocable trusts may also be desirable for couples who have children from previous relationships, and for individuals who wish to provide for their partner until their partner's death, but ultimately want their wealth to go to somewhere else once their partner dies. Grantors can structure revocable trusts to provide for their partner until the partner dies, and then pass the remainder on to someone else, such as the grantor's children or other relatives.<sup>102</sup>

Ultimately, revocable trusts are ideal for grantors who wish to retain the right to revoke or amend the trust. Although revocable trusts provide the grantor flexibility, they do not serve to remove the assets put into trust from the grantor's estate. If flexibility is less of a concern, and the grantor is motivated to remove assets from his estate, an irrevocable trust might be more appropriate. However, placing funds into an irrevocable trust for the benefit of an unmarried partner has gift tax implications.

### 1. Charitable Remainder Trusts

Charitable remainder trusts may also be a useful tool for unmarried couples. A charitable remainder trust is an irrevocable trust that can make distributions to individual beneficiaries for a term of 20 or less years, or for the remainder of the beneficiary's life.<sup>103</sup> When the term ends or the beneficiary dies, the remainder of the trust passes to a qualified charitable organization.<sup>104</sup> Charitable remainder trusts can be structured to pay the beneficiary a fixed dollar amount or a fixed percentage of the property in trust each year. Although a charitable remainder trust may have gift or estate tax consequences in cases where the marital deduction is not available, the charitable deduction the grantor is entitled to because the remainder of the trust passes to a charitable beneficiary, may serve to cancel out or significantly lessen any tax liability due on the transfer.

### 2. Charitable Lead Trusts

Charitable lead trusts pay an annuity to a charity for a term of years or for the remainder of an individual's life. Then, at the end of the term, the remainder of the trust goes to an individual.<sup>105</sup> A charitable lead trust could be structured so that a charity receives payments for the remainder of the grantor's life, and upon

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101. *Id.*

102. *Id.*

103. I.R.C. § 664(d)(1) (2012).

104. Goffe, *supra* note 7, at 933.

105. *Id.* at 935.

the grantor's death, the remainder is transferred to the grantor's partner.<sup>106</sup>

### 3. Life Insurance

Life insurance and Life Insurance Trusts (ILITs) can be useful tools in estate planning for unmarried couples. Life insurance policies are private contracts, and for that reason, do not go through probate.<sup>107</sup> Life insurance policies may also be used to replace certain funds, like employee pensions, which an unmarried partner may not be eligible to receive.<sup>108</sup>

Using life insurance as an estate planning tool has some disadvantages. If the insured retains control over the policy until his death, the proceeds will be included in the insured's gross estate.<sup>109</sup> However, this may not be a problem for couples' whose respective estates do not exceed the unified credit amount. To avoid the policy being included in the insured's gross estate, the insured could irrevocably assign the policy to the beneficiary using an ILIT; provided the ILIT is structured properly, this should remove the insurance from the insured's estate.<sup>110</sup> However, this transaction is irrevocable and cannot be undone in the event the relationship dissolves. Additionally, such a transaction may be subject to gift tax.<sup>111</sup>

### 4. Split Interest Trusts

Grantor Retained Income Trusts (GRITs), Grantor Retained Annuity Trusts (GRATs), and Qualified Personal Residence Trusts (QPRTs) are other options a grantor could utilize to transfer assets to a partner. All of these trusts "split" the interest in trust between the grantor and a beneficiary. This "split interest" makes the property subject to taxpayer-favorable valuation rules known as the "subtraction method".<sup>112</sup> For purposes of the subtraction method, the amount of the value of the gift the taxpayer makes is calculated by reducing the value of the property put into the trust by the value of the interest that the grantor retains. This valuation method is particularly pertinent to unmarried couples, since married partners and "relatives" cannot utilize the same favorable valuation technique.<sup>113</sup> Each of these trusts can be created so that the grantor makes a completed gift for gift tax purposes when putting the assets into the trust, and values the gift using the subtraction method, to maximize tax benefits.<sup>114</sup> Additionally, provided the grantor lives until the end of the trust's term, the assets will not be included in his gross estate.

106. *Id.*

107. Racey, *supra* note 37, at \*3.

108. *Id.*

109. I.R.C. § 2042 (2012); Chase, *supra* note 87, at 389.

110. Chase, *supra* note 87, at 389.

111. *Id.*; see *Crummey v. Comm'r*, 397 F. 2d 82 (9th Cir. 1968) (holding that a grantor could utilize the annual exclusion in this transaction by ensuring that the beneficiary has the proper "Crummey powers.").

112. I.R.C. §§ 2702, 2704 (2012).

113. §§ 2702; 2704(c).

114. Nancy G. Henderson, *Special Challenges and Opportunities in Estate Planning for the Passage of Wealth to Relatives (Other than Spouses and Descendants), Friends, Employees, and Non-Marital Life Partners*, in *ADVANCED ESTATE PLANNING TECHNIQUES* 303, 333 (2010).

A GRIT allows a grantor to put assets into a trust for the benefit of a beneficiary while retaining all or a portion of the income produced by the assets for a fixed term. The grantor pays gift tax on the assets when they are put into trust. Importantly, when valuing the property for gift tax purposes, the grantor can use the subtraction method. Then, at the end of the term, the assets (which presumably have appreciated) pass to a beneficiary (presumably, the grantor's partner), and no additional gift tax liability is owed on the appreciation.<sup>115</sup> Although GRITs are non-statutory, it is accepted that married couples could not create a GRIT with their spouse as the beneficiary.<sup>116</sup> However, as unmarried partners are not subject to this same rule, they may utilize their benefits.<sup>117</sup> GRITs can be advantageous because they do not necessarily have to produce income, but can successfully transfer appreciating assets while incurring low gift tax liability.<sup>118</sup>

With a GRAT, a grantor transfers assets which have a high potential for producing income to a trust, and receives an annuity for a term of years.<sup>119</sup> As with a GRIT, the grantor pays gift tax on the assets transferred to the GRAT at the time of the transfer, and the transferred assets are removed from the grantor's estate, provided the grantor lives until the end of the GRAT term. It is also possible to "zero-out" a GRAT for gift tax purposes; the grantor's retained interest could be so valuable that the remainder interest (the amount on which gift tax is owed) is negligible or zero.<sup>120</sup>

Qualified personal residence trusts (QPRTs) can be a useful tool for transferring a house from one partner's estate to the other partner's estate, which can be beneficial for equalization purposes. Additionally, a qualified personal residence trust can give a couple security that an unmarried partner will have a place to live if the partner who owns the couple's residence dies.

QPRTs have many tax advantages. They permit a personal residence to be removed from the grantor's estate (provided he lives until the end of the QPRT term), while using a favorable valuation method to calculate the amount of gift tax liability, since the grantor retains the right to reside in the residence for the entire QPRT term.<sup>121</sup> A downside of QPRTs is that they are irrevocable and the asset in question is very valuable; therefore, they may not be appropriate for couples whose relationship may end.<sup>122</sup> Additionally, if the couple is unrelated and can therefore utilize a GRIT, a grantor may wish to transfer the personal residence into a GRIT instead of a QPRT. Transferring a personal residence to a GRIT instead of a QPRT may afford the couple the same advantages of a QPRT, with more flexibility, such as allowing the grantor to purchase the house back at the end of the QPRT term.<sup>123</sup>

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115. Berall, *supra* note 31, at 392-93.

116. I.R.C. § 2702 (2012); 26 CFR § 25.2702-2 (2012); Henderson, *supra* note 115, at 339-41.

117. Henderson, *supra* note 115, at 339.

118. *Id.* at 335. This would be subject to state law provisions governing income producing trusts.

119. *Id.*

120. *Id.*

121. *Id.* at 336.

122. *Id.*

123. Henderson, *supra* note 115, at 340.

## V. PARTNERSHIPS AND LIMITED LIABILITY CORPORATIONS

Limited Liability Corporations or Family Limited Partnerships can be utilized in situations where a partner wants his or her partner to have access to some assets, but would still like to be involved in overseeing asset management. These devices may be particularly appropriate for partners who wish to ensure their partner has a working understanding of asset management. In some cases, these entities can be structured in a way that produce even greater tax advantages for unmarried couples than they would produce for parties related to one another for purposes of the Tax Code.<sup>124</sup> For example, business interests retained by a donor are generally disregarded in valuing interests transferred to family members.<sup>125</sup> This is not the case for unmarried partners. If these devices are carefully constructed, they may be successful at removing assets from the donor's estate<sup>126</sup> and may also be eligible for favorable gift tax treatment.<sup>127</sup> However, these devices may not be appropriate if they are merely established to avoid making outright gifts and have no other purpose.

## VI. JOINT PROPERTY OWNERSHIP

Property law is a matter of state law. This section outlines the basic devices of tenancy in common and joint tenancy. However, the applicability of these devices may vary by state. Importantly, if a same-sex couple has a valid marriage, but owns property in a state that does not recognize same-sex marriage, it is likely that they will not be treated as married for purposes of property ownership. Therefore, it is important that couples are aware of and comply with the requirements of the property laws of the state where the property is located to ensure the property is owned and transferred as desired.

## A. Tenancy in Common

When unmarried couples own property together, in the absence of specific language clarifying a desire to hold the property in a joint tenancy, many states will presume the property is held in a tenancy in common.<sup>128</sup> This can be problematic for estate planning purposes, since tenancies in common do not carry a right of survivorship. Tenants in common each own a fraction of an asset. When one tenant in common dies, the decedent's portion of the property does not necessarily pass to the other tenant in common; it is disposed of as any other piece of property, such as in a will or through intestate succession.<sup>129</sup>

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124. I.R.C. §§ 2701-4 (2012); *Id.* at 349.

125. Henderson, *supra* note 115, at 349.

126. See *Strangi v. Comm'r*, 417 F.3d 468, 479-82 (5th Cir. 2005) (finding that the Tax Court did not clearly err when it found that Strangi's transfer of assets to the Strangi Family Limited Partnership lacked a substantial non-tax purpose).

127. Racey, *supra* note 37, at \*4.

128. See *e.g.*, *Kent v. O'Neil*, 53 So.2d 779 (Fla. 1951) (holding that, where property was conveyed to man and woman as "husband and wife, as an estate by the entirety with full rights of survivorship," and the man and woman agreed in writing to sell the property before the man died, an award of full consideration for the property to the woman was upheld on appeal, even though man and woman were never married).

129. Racey, *supra* note 37, at \*3.

## B. Joint Tenancy with Rights of Survivorship

A joint tenancy carries with it a right of survivorship, which is advantageous for estate planning purposes. If a couple owns property held in a joint tenancy with a right of survivorship, when one partner dies, the decedent's property passes to the surviving partner. Another advantage of joint tenancies is that they are typically difficult to challenge, as the property passes directly to the surviving joint tenant upon the other joint tenant's death.<sup>130</sup> The arrangement would have to be challenged in contract, not probate. Importantly, some states have abolished joint tenancies between unmarried partners.

The downside of joint tenancies is their tax implications. The Tax Code presumes that married spouses each own one-half of property held in a joint tenancy. However, the Tax Code does not apply the same rules to unmarried couples.<sup>131</sup> If one unmarried joint tenant dies, the entire value of the property held in the joint tenancy will generally be included in the decedent's estate. Then, the full value of the property will *again* be included in the estate of the other joint tenant, when that joint tenant dies.<sup>132</sup> This might not be a problem for couples whose estates are not large enough to be subject to estate tax, but if either partner's estate could be subject to estate tax, the couple would probably desire to avoid the potential for double taxation. Couples may be able to avoid being taxed twice in this way by keeping thorough records of their relative contributions to the joint tenancy. By doing so, the surviving spouse will be able to show that he or she furnished adequate consideration for the property or contributed to the acquisition of the property, and that the property should be taxed accordingly.<sup>133</sup>

In addition to the estate tax consequences of a joint tenancy, there may also be gift tax consequences. If one partner already owns the property in question, adding the other partner's name to a deed to establish a joint tenancy could result in a taxable gift.<sup>134</sup> This could be avoided if the partner who is added to the deed provides adequate and full consideration for their portion of the property.<sup>135</sup>

## VII. SPECIAL PROPERTY CONCERNS FOR UNMARRIED COUPLES

Couples remain unmarried for many reasons. Some couples may not be permitted to marry by the laws of their state, and other couples who could be legally married choose not to marry. Some couples may choose to remain unmarried because they intend to keep their assets and finances separate. This could be particularly wise for older adults, who may wish to spend the rest of their life with someone, but do not want to commingle finances. If sharing a life without sharing finances is a couple's desire, an agreement stating this intention may be very important, as there may be state law provisions that would entitle

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130. *Id.*

131. I.R.C. § 2040(a)-(b) (2012). Roang & Larson, *supra* note 1, at 60.

132. Roang & Larson, *supra* note 1, at 60.

133. *Id.*

134. Racey, *supra* note 37, at \*3.

135. 26 C.F.R. § 25.2512-8.



one partner to property in the other's estate if the relationship dissolved.

#### A. State Domestic Partnership Designations

The American Law Institute has developed the "Principles of the Law of Family Dissolution" to address societal shifts that pertain to family law. This is essentially a model statute which states can modify and adopt.<sup>136</sup> State versions of this statute could serve as the "default rules" protecting rights of unmarried couples which seem to be missing in many jurisdictions.

This model statute offers a way for determining which relationships qualify as a "domestic partnership" and what rights this designation could confer onto couples.<sup>137</sup> For example, under these principles, unmarried partners who qualify as domestic partners might be required to split assets or provide support for their partner at the dissolution of the relationship.<sup>138</sup> The principles do not require an explicit agreement for earning a designation as domestic partners; domestic partners are merely "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."<sup>139</sup> The principles clarify that couples should be able to contract around these rules,<sup>140</sup> but if a couple lives in a state that has adopted such domestic partnership provisions, and the couple has not contracted around them, the rules may govern the dissolution of their relationship.

These types of statutes could have important implications for estate planning purposes. For example, the model statute suggests distributing "domestic partnership property," essentially any property that would have been marital property if the couple were married, at the dissolution of a domestic partnership in the same way the property would be distributed if the couple had been married. Additionally, the model statute also suggests that domestic partners should be entitled to support payments (alimony) if they would have been entitled to such payments as a married partner based on state law.<sup>141</sup> As states start to recognize that unmarried couples live in marriage-like relationships, developing statutes to provide default rules for these couples might become more common. The development of this model statute serves as a reminder of the importance of establishing cohabitation agreements and "contracting around" such default rules if partners do not wish to be subject to them.

#### B. Notable Case Law: Unjust Enrichment

Some states recognize that unmarried couples have claims in contract against one another which could entitle unmarried partners to certain property rights. For example, in one seminal California case, the court holds that express

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136. PRINCIPLES, *supra* note 61, at § 6.03.

137. *Id.*

138. *Id.*

139. *Id.* at § 6.03(1).

140. *Id.* at § 6.03, cmt. b.

141. *Id.*

contracts between unmarried couples should be enforced.<sup>142</sup> The court goes on to hold that in the absence of an express contract, courts should inquire as to whether the partners' conduct demonstrates an implied contract. This is significant, because, based on the facts of the situation, such contracts could warrant an order of partner support and could entitle an unmarried partner to half of the other partner's property at the dissolution of the relationship.<sup>143</sup> Currently, Washington permits equitable distribution of property based on cohabitation alone – that is, no express or implied contract is required.<sup>144</sup> Once the court determines a specific type of relationship exists, it can evaluate the property rights of each partner based on that fact alone, and make a fair and equitable distribution of the property.<sup>145</sup> Therefore, as family law dynamics evolve, cohabitation agreements outlining the each partner's intentions become increasingly important.

### C. Common Law Marriage

Some states still have common law marriage provisions.<sup>146</sup> If a couple wishes to remain unmarried but live in a marriage-like relationship, they should take steps to ensure that their relationship will not be regarded as a common law marriage for purposes of property distribution at the dissolution of their relationship. Couples who do not intend to marry should not declare that they intend to live as husband and wife in cohabitation agreements. Couples who are not married and who do not intend to be married should also not indicate to others that they are married.<sup>147</sup> Additionally, even if a couple does not live in a state that recognizes common law marriage, owning property in a state with common law marriage could be enough of a nexus to establish a valid common law marriage in that state, which would have implications for property distribution.<sup>148</sup>

### CONCLUSION

The definition of "family" is changing.<sup>149</sup> The lack of consistency and existence of default rules for unmarried couples can make estate planning especially confusing. In some instances, a lack of default rules makes it so that unmarried partners are not entitled to assets that their partner would want them to have.<sup>150</sup> In other instances, recent default rules impose new requirements on

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142. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

143. *Id.* Note that California is a community property state.

144. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

145. *Id.* at 835.

146. *See e.g.*, S.C. CODE ANN. § 20-1-360 (1976) (South Carolina's common law marriage provision); TEX. FAM. CODE ANN. § 2.401(a) (Vernon 2006).

147. *See Goffe, supra* note 7, at 873-74 (explaining that 11 states still recognize common law marriages, and that common law marriages usually require intent to be married, cohabitation, and that the couple holds themselves as married publically).

148. IRA MARK ELLMAN ET AL, FAMILY LAW: CASES, TEXT, PROBLEMS 132 (5th ed. 2010).

149. *See e.g.*, JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 6 (1997).

150. *See e.g.*, N.C. GEN. STAT. § 29-14 (West 2012) (governing the share of surviving spouse

relationships.<sup>151</sup> Such rules can be problematic: requirements may not be clear and couples may not know that these recent default provisions exist. This highlights the importance of creating wills and cohabitation agreements to outline unmarried couples' intentions.

Additionally, estate planning becomes even more confusing for same-sex couples who are legally married, but who live in a state that does not recognize same sex marriages. For purposes of *federal* tax, they will be considered married. However, for purposes of property distribution, probate, and state tax, they may not be considered married. Despite these difficulties, there are many devices these couples can take advantage of when developing an estate plan. These include the use of trusts, life insurance, and property sharing devices. Additionally, unmarried partners may be able to use some devices that are not available to their married counterparts, such as Grantor Retained Income Trusts. In utilizing any of these devices, it is important to understand how the tax consequences of estate plans differ for married and unmarried couples, and how state law might impact the way certain devices can be implemented.<sup>152</sup>

It is also important to remember that added sensitivity may be required when dealing with unmarried couples. Such couples may wish to keep the nature or existence of their relationship private, which may require consideration when developing an estate plan. Additionally, such couples may face a high risk that their relatives will attempt to challenge their will; therefore, competency concerns may be amplified.

The changing nature of family law makes estate planning for unmarried couples especially important. Hopefully, the Supreme Court review of the constitutionality of DOMA in June of 2013<sup>153</sup> and the subsequent IRS Revenue Ruling extending marriage benefits to all same-sex marriages<sup>154</sup> were merely the first installations in a long line of policy changes that will recognize additional rights for same-sex couples.

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without any default rules); FLA. STAT. ANN. § 732.103 (West 2007) (governing the share of other surviving heirs).

151. See e.g., CAL. PROB. CODE § 6401 (West 2003) (defining the intestate share of a surviving domestic partner); *Marvin v. Marvin*, 557 P.2d 106, 119 (Cal. 1976) (“nothing distinguishes the property rights of a nonmarital ‘spouse’ from those of a putative spouse”); *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (holding property and income acquired during meretricious relationship subject to equitable distribution).

152. I.R.C. § 2523 (2012).

153. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (The Supreme Court heard oral arguments on DOMA on Wednesday, March 27, 2012, and issued the *United States v. Windsor* decision in June of 2013).

154. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.