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MEMBER

TO MARRY OR NOT TO MARRY – FOR OLDER CLIENTS

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Introduction

In the old days, when life seldom lasted more than 70 years, the issue of remarriage later in life after the loss of a spouse seldom came up. In those days, widows and widowers usually lived near their adult children and many moved in with their children.

Times have changed. In 2006, 1.8 million Americans aged 50 and above lived in heterosexual “unmarried-partner” households.^[1] This can create problems with blending finances later in life. Today, widows and widowers can expect longer life spans, are often isolated from children, and live healthier, more active and independent lives. The desire and opportunity to find a new life partner has dramatically increased. Traversing the elder care journey from full capacity to diminished capacity can be an especially lonely journey without a companion.

We, as Elder Law Attorneys, are being called upon to answer this question from our unmarried aging clients: “Well you know, it’s been three years since Edith passed and life is better because I have a lady friend. What issues should I be aware of in considering remarriage?”

Getting married again later in life can offer renewed happiness and purpose – but it can also result in misery and regret. . .

This article will examine and provide advice on many of the key issues to consider in deciding whether to marry or live together as single persons. The key issues which decidedly weigh in favor of marriage will be covered first. The key issues, which can weigh either for or against marriage, will then be addressed. Next, planning ideas will be presented.

The Advantages of Marriage

In general, the law favors marriage, as it incorporates the Biblical principle of *two* become *one*.

1. **Federal Estate**. The estate tax marital deduction provides an *unlimited* deduction against the federal estate tax when a surviving spouse receives outright ownership or substantial control of an inheritance from a deceased spouse². Unmarried partners do not enjoy this advantage.
2. **Federal Gift Taxes**. When making lifetime gifts to each other, spouses enjoy an *unlimited* gift tax deduction³. By contrast, unmarried partners must use their annual gift tax exclusion and \$1.0 million lifetime exemption when making gifts to each other.

When making gifts to others, each spouse in a marriage can leverage the \$13,000 annual gift tax exclusion to \$26,000, even though that spouse is the actual donor. In community property States, any gift of community property is treated as

a gift of one-half by each spouse. In common law States, the same can be accomplished under the “gift-splitting” rules, wherein the non-donor spouse signs a consent on IRS Form 709⁴. By contrast, unmarried partners have no such leveraging opportunity in making gifts to others.

3. **Increased Exclusion When the Home Is Sold.** Internal Revenue Code (IRC) §121 provides a \$500,000 exclusion for married couples when the home is sold, even if the home was only owned by one spouse. By contrast, an unmarried partner can only receive a \$250,000 exclusion. [For example, a house purchased for \$100,000 is later sold by the couple for \$500,000. If they are married, they can each protect \$250,000 (\$500,000 total) from capital gain tax; whereas if they are not married, only the owner can protect \$250,000 from such tax.]
4. **IRA and Retirement Plan Advantages.** The IRC allows a nonworking spouse, without earned income, to contribute to a traditional or Roth IRA if the working spouse has sufficient earned income⁵. This advantage is not allowed for unmarried partners.

The IRC provides even more significant tax advantages for the surviving spouse who is named as the primary beneficiary of a traditional and Roth IRA. The key advantage is the ability of the surviving spouse to do a tax-free rollover of the IRA into his or her own name⁶. This helps to further defer [delay] income tax. By contrast, the surviving unmarried partner who is named as primary beneficiary has no rollover advantage.

5. **Nonqualified Annuity Advantage.** The Tax Code offers married couples a “spousal continuation” tax advantage, similar to the IRA rules, for nonqualified annuities. When the surviving spouse is named as primary beneficiary of a nonqualified annuity, he or she may elect to continue the annuity in a tax-deferred status by placing it in his or her own name⁷. By contrast, an unmarried partner who is named as the primary beneficiary must take distributions as a beneficiary under rules which accelerate taxation.
6. **Additional Stepped-Up Tax Basis Advantage.** In common law States, a surviving spouse of jointly-owned capital assets receives a 50% stepped-up tax basis, even if he or she did not contribute to the purchase of the asset⁸. [That is, the taxable basis of the deceased married partner’s interest in the property will be increased to the value at date of death for the surviving spouse, resulting in less capital gain tax when the asset is later sold.] In community property States, the surviving spouse of community property capital assets receives a 100% stepped-up tax basis, even if he or she did not contribute⁹. By contrast, the non-contributing partner to jointly-owned capital assets will not receive any stepped-up tax basis, only a carry-over basis from the deceased partner.
7. **Medical Decision-Making and Access to Medical Records.** In a significant number of States, the spouse of a patient is authorized by statute, in the absence of a health care power of attorney (HCPOA), to make medical treatment decisions, including in life support situations when the patient has lost capacity. [Mississippi’s “health care surrogate” law permits a spouse to make medical decisions for the other spouse without written power of attorney, if they are not legally separated.] Such laws seldom give a similar status to an unmarried

partner. However, this situation can be remedied by having each unmarried partner prepare a HCPOA naming the other partner as health care agent.

The federal Health Insurance Portability and Accountability Act (HIPAA) places one's medical records into a privacy lock-box. Although HIPAA provides no special access to medical records between spouses, hospitals and physicians generally release medical information of one spouse to the other spouse and often deny access to unmarried partners. This situation can be remedied by having each unmarried partner sign a HIPAA authorization for the other partner.

8. **Probate Laws Favor Surviving Spouses.** The probate laws of most, if not all States, provide the surviving spouse with priorities and elections unavailable to unmarried partners, such as priority in being appointed as Personal Representative (PR) when there is no Will or forced or elective rights in probate estate and/or expanded estates. [In Mississippi, a surviving spouse can claim one year's support as a "widow(er)'s allowance" and can "renounce" the deceased spouse's will if it leaves the surviving spouse out.] With proper planning, an unmarried partner can be named as the executor under a Will, or better yet, as a Trustee under a Trust and can obtain a guaranteed inheritance in the event the other partner predeceases.
9. **Funeral and Burial Decisions.** In most States, a surviving spouse will be given the right to determine funeral and burial decisions for his or her deceased spouse¹⁰. By contrast, the unmarried partner will have little control over the funeral and burial of his or her partner, leading to potential conflicts with the deceased partner's children.

¹¹ Susan Brown, Bowling Green University demographer, *Should You Remarry or Just Shack Up?*, Forbes Magazine, November 12, 2007.

²IRC § 2056(a).

³IRC § 2523.

⁴IRC § 2513.

⁵IRC § 219(c)(2). The spouses must also file a joint 1040.

⁶IRC § 402(c)(9). Another advantage is that the surviving spouse as new IRA owner will automatically add an extra 10 years to life expectancy in determining minimum required distribution.

⁷IRC § 72(s)(3).

⁸IRC § 2040 and IRC § 1014(b)(9).

⁹IRC § 1014(b)(6).

¹⁰However, Wisconsin now allows its residents to appoint a representative to control their funeral and burial in accordance with written instructions, Wis. State. Chapter 154.30(8)(f).

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