



Planning for Nontraditional Relationships and the Evolving Definition of Marriage

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A growing number of Americans consider themselves family even though marriage is not part of the equation. If you cannot marry — as is true for most gay and lesbian couples in the United States, or choose not to marry — as is increasingly common, particularly among elderly couples, the absence of a marriage certificate has wide ranging consequences. Some of these we can “plan around”; others we just keep in mind.



Over 1,100 federal and 500 state determined rights, benefits, and privileges are conditioned on marriage. Many state laws deal with the issues raised in this book. For example, the laws of intestacy — who inherits property when there is no will, and the laws of guardianship — who will take care of your financial matters if you’re incapacitated and haven’t signed a pre-need appointment of a guardian or a power of attorney, will be determined by state law. Many of us watched the battle between Terri Schiavo’s husband and parents (numbers one and two on the default state list of health care surrogates) over decisions about her care. Other consequences of no marriage license include denial of employer benefits for a surviving partner, less advantageous access to retirement plans, and lack of shared Social Security benefits.

Bottom line: without being pro-active, if the two of you are unmarried but consider yourselves family, you’re not likely to be able to care for each other in the event of disability and make emergency health care and financial decisions for each other, nor will you inherit from each other, nor settle your partner’s affairs after death.

Let’s suppose Pat and Chris live together, consider themselves family, and yet haven’t legally “tied the knot.” They want to buy a home together and are considering how to title their property. An easy way to pass property at death is through legal title. Like many unmarried couples, Pat and Chris may find it emotionally satisfying to own property as “Joint Tenants with Right of Survivorship.” They also like the fact that property owned this way passes from one to the other in the event of death without probate.

But owning property this way has its own drawbacks. First, both people will be needed to transfer title, so if one becomes disabled, there must be a “durable power of attorney” or similar document allowing the non-disabled partner to handle the affairs for both of them. If Pat has a taxable estate and predeceases Chris, Chris will have to prove Chris’ contribution to the property, or the entire value of the property will be included in Pat’s estate — not just half, but all of it, due to a presumption in the federal tax law.

Suppose Chris is in an accident, and can’t make medical decisions. Unless Pat is named as Chris’ health care surrogate or proxy, the law will likely provide that Chris’ parents, or if they’re not around, Chris’ siblings, have the right to make those decisions. If Chris’ condition is terminal, unless Pat is named in a living will, Pat won’t be able to make decisions about discontinuing Chris’ care, even though Pat probably knows more about Chris’ feelings about end-of-life care than anyone else. Moreover, Pat won’t be able to take care of Chris’ financial affairs, even if their finances have been intertwined for years. Heck, without the proper documents, Pat may not even be allowed to visit Chris in the hospital or obtain Chris’ medical file!

Suppose they are living in a house owned by Chris. If this accident proves fatal, then without planning, Pat is out of the house. Chris’ family — again, at the top of the state’s default list — will be the ones who manage Chris’ estate and Pat will be left with nothing but memories.

Now suppose Pat and Chris did some planning before the accident occurred. First, you would expect to see a Health Care Proxy which would assure Pat could make decisions for Chris if Chris were incapacitated. There would also be a living will, authorizing Pat to make decisions about “pulling the plug.” (Note that in some states these documents are combined into a single document called an Advance Health Care Directive.) Chris would also give Pat a durable power of attorney for property management so Pat could make decisions regarding Chris’ financial affairs. Another document would ensure Pat would be appointed legal guardian if Chris were incapacitated.

Chris’ will would appoint Pat as the executor to handle Chris’ estate, and also ensure Pat has the right to continue to live in their house (assuming, of course, it is Chris’ intent). All in all, a lot of the worst consequences could readily be avoided.

A particularly useful document in this area is a revocable living trust. Think of a folder. A trust, like a folder, holds what’s put into it. The difference is that on the cover of the folder, the person setting up the trust — the “grantor” or “trustor” — lists instructions about what to do with what’s in the folder, both in the event of disability and death — so this becomes the primary estate planning document. And like the “joint tenancy” title we discussed before, trust property — the property in our hypothetical folder — also passes outside of probate, without the tax presumption problem of joint tenancy.

Critically, the lack of a marriage license impacts planning because there is no federal or state gift and estate tax “marital deduction.” A legally married couple can transfer assets between them during life and at the death of the first, and no gift or estate

tax will be due the government until both partners have passed away. Pat and Chris have to plan with the expectation that tax will be due when each one dies.

Everything we've talked about so far applies to the couple regardless of Pat's or Chris' sex. But if Pat and Chris are of the same sex, they may wonder about tying the knot, now that it is an option available in some states in some form or other.

The answer: the lawyer's standby — "It depends." First, it depends on where they live. If they live in a state that has some sort of legalized same-sex union, they will at least get the benefits and have the obligations of a married couple under their state law. But presently, that marriage will have no effect on the federal level, because federal law provides that marriage is only between a man and a woman. When it comes time to pay taxes, they may be faced with filing as a married couple for state tax purposes, and as single individuals for federal tax purposes.

It gets more challenging if the couple moves to another state, or gets married elsewhere and returns home. If the home state, like the federal government, only recognizes opposite sex marriages, then the union is likely to have no legal effect whatsoever — unless the couple wants to dissolve it. If that happens, their home state may well look at a divorce petition and say, "Because we don't recognize this marriage, we can't even dissolve it." This becomes even more tricky with "marriage equivalents" like civil unions, which have been created in many states, but are unknown in others.

Given the uncertainty, what should Pat and Chris do? By all means, they should get married if that's the degree of commitment they have towards one another. But until the law becomes a good deal more settled, marriage is no substitute for good estate planning!

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