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# Estate Planning for Gay and Unmarried Couples: A Key Need for a Growing Demographic Sector

*(This article was written and published in the Journal of Financial Planning prior to the U.S. Supreme Court's ruling striking down most of the Defense of Marriage Act.)*

By Richard F. Stolz

In their 2005 book, "Money Without Matrimony,"[1] coauthors Sheryl Garrett, CFP, and Debra A. Neiman, CFP, painted a grim picture of what the surviving member of an unmarried couple might face after the death of a partner. "They can become mired in a financial and emotional mess—destitute and homeless—all while trying to cope with the loss of a partner."

"None of that is exaggeration, either," they added, to squelch any skepticism about how wretched things could get.

Little has changed in the intervening years, save the recognition of gay marriage in a few states -- a development that does not eliminate all estate planning pitfalls for such couples in those states. The scenario painted by Garrett and Neiman may still be read as a loud wake-up call for planners who find themselves working with unmarried couples, whether heterosexual or same-sex, as well as married gay couples.

Given today's demographic trends, it would hardly be unusual for a planner to be across the desk from either an unmarried couple, or a partner of such a couple. The percentage of unmarried households in the U.S., as measured by the Census Bureau, grew by 24 percent in the decade ending in 2010.

**A Growing Demographic Segment**

Six percent (about seven million) of all 115 million U.S. households fell into the "unmarried" category in the 2010 Census (see box) – representing nearly 14 million individuals. Roughly 90 percent of that group is heterosexual couples, and the other 10 percent are same-sex couples, nearly evenly split between female and male couples.

Unmarried-Partner
Households in the U.S. By

[1] Published by Dearborn Trade Publishing, a Kaplan Professional company

Sex of Partners

| | Number of Households | Pct of total |
|---|---|---|
| Total U.S. Households | 114,567,419 | 100.0% |
| Total Unmarried Households | 6,768,083 | 5.9% |
| Female Household and Male Partner | 3,103,975 | 2.7% |
| Male Household and Female Partner | 3,070,784 | 2.7% |
| Female Household and Female Partner | 305,637 | 0.3% |
| Male Household and Male Partner | 287,687 | 0.3% |

Source: 2010 U.S. Census

For general practice financial planners, the challenge is to know enough to provide accurate and helpful general guidance on estate planning (and related) topics to such couples, while avoiding straying beyond their level of expertise – just as they would with married opposite-sex couples. Another challenge planners may wish to take on: Boning up on the estate planning issues specific to unmarried couples, in order to broaden their client base.

In general, what's involved?

David J. Alex, CPA/PFS, is a seasoned financial and tax-planning practitioner for individuals and small businesses in Cincinnati. While he does not specialize in gay or other unmarried couples, such clients represent a significant component of his client base. "I do a lot of estate planning work for the gay community and others," he says. "I read a lot of wills and trusts. People ask me, 'When I die, is this really what's going to happen with my estate?'"

**Invasion of the Body Snatchers**

Such clients have good reason to be posing that question: In many circumstances, without expert, tailored planning, their assets could wind up other than where they intend due to disputes from family members. In one extreme case recounted by another planner, the actual body of the deceased was

snatched from the custody of his gay partner by a family member in order to control the funeral and burial arrangements.

In a more typical conflict that Alex has witnessed, an unmarried heterosexual couple were joint owners of a house. The future husband had contributed all of the funds to purchase and improve the house, and considerable equity had built up in the property. The couple intended to marry, but shortly before the scheduled event, the wife-to-be died, and her family laid claim to her interest in the house. It was a legally defensible position in that jurisdiction, so Alex' client "had to pay many thousands of dollars to get her family off his back."

Planners who assist unmarried straight and gay couples with estate planning issues have, naturally, made a priority of learning the unique rules and strategies that apply in their jurisdiction (see sidebar on page xx on learning resources).

As a starting point, Jill Hollander, CFP, a principal of Financial Connections, a fee-only practice based in Corte Modera, Calif., suggests that planners make an exercise of listing basic estate planning issues and strategies, and making a side-by-side comparison of how they may or do differ between married and unmarried couples. Even when lacking all the answers, doing so begins the essential thought process of focusing on the distinctions – and making them aware of the limits of their knowledge.

Hollander, who is gay, from her own life experience, may have had an advantage in having an understanding of the differences involved (see box on page xx). The financial priority for many of her clients is retirement planning. So, for example, she can factor in Social Security survivor benefits into the equation for married couples, but not for unmarried couples. The same may apply aspects of qualified retirement plans.

**"Legal Strangers"**

Even the surviving members of a same-sex couples married in states that recognize gay marriages would not be eligible for Social Security survivor benefits, as same-sex couples generally amount to "legal strangers" under federal law, Hollander says -- although that area of law has grown more complex in recent years. That result often necessitates particular attention to the titling and disposition of assets of the member of the couple with greater assets, to assure the less wealthy member is adequately provided for should he or she be the second to die.

Federal tax law, which does not make allowances for unmarried couples, can create unexpected financial consequences upon the death of a member of an unmarried couple. An example that illustrates the level of planning required is the surviving member of an unmarried couple's inability to get a stepped-up tax basis in real estate inherited from the deceased.

Even such basic planning tools outside the realm of finances, such as advance medical directives used by unmarried couples, may lack legal authority if couples use boilerplate documents, Hollander warns.

Because unmarried opposite-sex couples vastly outnumber same-sex couples, the estate planning issues they face may be more familiar to general

practice planners. Working with same-sex couples may be a different matter, particularly given the legal recognition of gay marriage by several states in recent years.

A basic overview of the current state law treatment of same-sex couples, courtesy of Frederick Hertz, an Oakland, Calif.-based attorney and specialist in same-sex couples' legal issues, is shown in the accompanying box.

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BOX
States with varying recognition
of rights for same-sex couples

**Marriage is fully recognized:**
Iowa, Vermont, New Hampshire, Massachusetts, Connecticut, New York, District of Columbia. Couples that married in California in 2008 are still validly married, but same-sex marriage is currently not permitted in that state.

**"Marriage-equivalent registration" available:**
Washington, Oregon, California, Nevada, Illinois, New Jersey, Rhode Island, Delaware and Hawaii

**Limited registration options:**
Maine, Colorado, Wisconsin and Maryland

**Foreign and out-of-state same-sex marriages…**
are recognized in marriage equality states, and may also be recognized in Maryland, New York, New Mexico and Wyoming.
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Complexity is added to the variety of state laws by the interrelationships among those laws, and the impact on couples moving from state to state, Hertz says.
"Same-sex couples can't be married in California today, but if they got married in New York, that marriage would be recognized here."

Thus generalizations are hazardous, says Hertz, co-author of the book, "Making it Legal: A Guide to Same-Sex Marriage, Domestic Partnerships & Civil Unions," published by Nolo press.

**Ambiguity of Marital Status**

"Knowing whether you are considered married under state law is easy if you're a straight couple," he says. "Either you got married, or you did not. For gay couples, sometimes it isn't clear."

One gay couple known to David Alex was able to eliminate any doubt about the legality of their marriage in their current state of residence – not the state where they were married, where gay marriage was recognized. They did so when one member of the couple underwent a sex-change operation. That

decision, however, may have been motivated by more then merely legal considerations, Alex suspects. “I think there were other issues involved.”

But for same-sex couples who remain that way, there is no ambiguity about their status under federal law, as noted: Their marriages simply aren’t recognized – at least for now. Any doubts about that were eliminated sixteen years ago in 1996 when Congress enacted the Defense of Marriage Act. That law explicitly rejects federal recognition of same-sex marriages, and declares that states are under no obligation to recognize gay marriages that took place in other states.

To many clients and even other lawyers and planners, the whole concept of being “state married and federally single is jut intellectually incomprehensible,” Hertz says. So that’s the essential point he drives home with gay couples whose marriages are recognized by their state.

“Every time you make a decision – opening a bank account, getting a loan, putting somebody on a title, doing a will, buying an insurance policy, setting up a beneficiary designation, there are different state and federal rules” that must be taken into account, says Hertz.

**Issues With Retirement Plans**

The top estate planning considerations for same-sex couples with respect to federal law include taxation of the estate, and transferability of pension and retirement plan benefits. The surviving spouse of a gay couple inheriting assets of a qualified retirement plan would face most costly immediate tax consequences than a spouse of a married heterosexual couple.

So one way to offset that potential tax penalty might be for one gay spouse to leave his or her interest in the house to the other, and use residual retirement plan assets for charitable bequests.

Financial planners shun the role of advising clients on the advisability of marriage – other than pointing out some of the financial ramifications. Indeed, most planners are presented with the marital status couples as a *fait accompli*. When Massachusetts first recognized gay marriages in 2004, “I had clients who ran to the altar, and afterwards came to me and began asking questions,” says Neiman, the “Marriage without Matrimony” co-author whose financial planning practice is based in Arlington, Mass, near Boston.

When he has an opportunity to discuss the financial implications of marriage for gay couples, Hertz strives to present a balanced picture. “Marriage is as much about responsibilities as it is about benefits,” he points out. That can include liability for debts.

Also, ending a same-sex marriage may be more complicated than one might think. A same-sex couple legally married in, for example, New York that moves to Arizona and tries to get a divorce there would be unsuccessful – “Arizona won’t give you a divorce, they’d have to move to a state that recognizes their marriage,” Hertz says.

“What I always say to people is, ‘You have to learn what the rules are for you in your particular situation with your particular life and dynamics.’”

**Whose money is it?**

He and others who have a significant experience suggest that certain attitudes about money are common among their gay clients, however. One of the central issues in financial planning for same sex couples is, "whose money is it?" On the one hand, "there is a much greater tendency for them to think of their money as separate rather than combined," according to Hertz.

This may go against the grain of straight planners who tend to have a different concept of how money is treated within a family.

At the same time, the issue that gay couples may not be aware of, Hertz says, is that their money may in fact be shared. "I'll hear things like, 'Oh, my girlfriend pays me rent," when in fact some states might consider their assets as pooled, if a dispute arose. "So working with same-sex couples means having do a lot of education about legally whose money it really is" – both in the present, and the estate planning implications.

It also can mean being willing to ask delicate personal questions, and creating an atmosphere in which clients are willing to answer them. "You have to be comfortable dealing with the qualitative issues" in clients' personal and family relationships, says Hollander. To alert clients (including unmarried opposite-sex couples) to the possibility of family disputes arising after a death, she asks them, "How does your family feel about your relationship?"

When there is any chance that the answer is disapproval, Hollander encourages clients to ensure that their estate planning documents leave no doubt about their intentions, such as by explicitly disinheriting particular family members, to preclude an assault on a gay family member's estate.

Each planner must develop a good sense of "knowing what you know and what you don't know" in dealing with these clients, or any others, of course, warns Neiman.

**Essential Knowledge**

How much does a general practice planner need to know? Most fundamentally, that "some of the basic assumptions of estate planning don't hold true" for unmarried couples and married same-sex couples, Neiman says. Beyond that, she says planners need to know how to say, "I would like you to consult with a specialist" – whether it be an estate planning attorney, another financial planner who has specialized in this client segment, or even a specialized counselor or therapist when conflicts over money preclude developing an estate plan.

Neiman also warns planners not to trust their financial planning software to produce the right scenarios or options for these clients.

Her own role in estate planning, as she sees it, "is really to get a sense of who owns what? What are the sizes of the estates? Where are they regarding titling and privacy? Do they own assets a certain way for privacy issues, or should they?" When she sorts it out, she briefs the estate planning attorney the clients have agreed to visit, and let the attorney take it from there.

General practice planners might feel some reluctance to refer an unmarried couple of married same-sex couple to another planner for general

advice if they want to retain that client to handle, for example, asset management. But trying to carve out distinct aspects of a clients financial needs and attempting to have the client maintain relationships with two planners might not serve the client well, according to Neiman.

Looking ahead, however, CFPs presently ill-equipped to address some of the needs (including basic estate planning) of unmarried couples and married gay couples, may be forsaking a growing demographic sector, based on the trends indicated by the U.S. Census and also a movement towards legal acceptance of gay marriages.

“The number of people who are married is declining all the time,” observes Hollander. As for public attitudes towards homosexuality in general and gay marriage in particular, “to younger people, it’s a ‘ho-hum, who cares’ response,” she says.

Hollander also considers the U.S. military’s abandonment of its “don’t ask, don’t tell” policy in September, 2011 as a sign of things to come. In addition, the Obama Administration’s declared policy of not defending the 1996 Defense of Marriage Act (DOMA) against any legal challenges, is also considered as a significant step.

Neiman and others who were buoyed by the Obama Administration’s stance on DOMA concede that decision – and the prospects in Congress for repeal of the law itself (which have faltered thus far) -- could be set back if a new president occupies the White House after the 2012 presidential election.

Still, for Neiman, the decision by New York’s legislature last June to recognize gay marriage represented a tipping point. “I think it’s a matter of time that, one by one, other states will start to pass” similar laws, she says. If so, that pattern and the growth of unmarried couples will challenge planners to expand their horizons and deepen their knowledge of the estate planning needs of this growing segment of the population.

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SIDEBAR # 1

The path to serving unmarried
couples and married gay couples

David J. Alex, CPA/PFS, has a broad financial and tax planning practice in Cincinnati. He did not set out to build a niche market of same-sex couples, but they have come to represent a meaningful percentage of his client base. “It just evolved,” he says. (He also has a fair number of clients in the clergy, who also have particular planning needs.) Nobody in the Cincinnati area had made a formal effort to build a niche practice around that segment; and many of his gay clients referred gay friends to Alex.

Debra Neiman, CFP, of Neiman & Associates in Arlington, Mass., has made more of a commitment to serving “unmarried couples or couples whose marriage is not recognized federally.” Early on she build up a core of such clients

and "I realized how underserved the group was, and that the advice [on estate planning matters] they had been getting was not necessarily correct."

The evolution of the practice of Jill Hollander, CFP, was somewhat different. First, her first office was in Berkeley, Calif. "Berkeley being Berkeley" -- home to the University of California and a long-time magnet for freethinkers -- the local demographic was rich with unmarried and gay couples. In addition, she recalls, as gay person herself, she had an epiphany. "Boy, if I'm having these financial issues, there must be a lot of other people like me having the same challenges."

SIDEBAR # 2

Resources for serving
gay, unmarried clients

Knowing how the estate planning and related needs of unmarried opposite-sex and same-sex couples, as well as married same-sex couples, differ from married opposite-sex couples is not instinctive. Planners who seek to serve the former groups invest time to build up the expertise needed to do the job well.

One resource they recommend for helping gay and lesbian couples is the membership organization Pride Planners ([www.prideplanners.org](http://www.prideplanners.org)). Its founders include Debra Neiman.

Pride Planners began in 1999 with a small, informal meeting of planners sharing experiences and concerns. The organization today holds regular conferences, and its website includes a "find a professional" function to link prospective clients with suitably qualified financial professionals in their community. It also lists several books, including "Making it Legal: A Guide to Same-Sex Marriage, Domestic Partnerships and Civil Unions," co-authored by attorney Frederick Hertz, and "Money Without Matrimony," co-authored by Debra Neiman.

Planners also find educational opportunities to learn more about serving these groups at professional gatherings including the FPA's conferences. Frederick Hertz, for example, gave a presentation at FPA's Experience 2011 in San Diego

SIDEBAR # 3

'Til break-up do us part:
Planning for dissolution

Planners seeking to provide basic estate planning guidance to unmarried gay and straight couples who intend to marry would be remiss not to encourage them to adopt prenuptial agreements, or other contracts, should the couple break up even without marriage.

Attorney Frederick Hertz points out that the national divorce rate is around 50 percent, and he believes that rate is higher among gay couples. The latter "have a different social culture that does not over-romanticize marriage, plus a much lower percentage of them have kids than straight couples," and thus less of an impediment to divorce.

The lesson for Hertz: you've always got to be planning for the dissolution of the relationship, which may be considerably more likely than the end of the relationship through the death of one of the partners or spouses. Two issues to resolve in planning for a breakup, according to Hertz:

1. "Who ends up with what, either by operation of marital law or non-marital law or a cohabitation agreement or a pre-nup," and
2. "How do we live our lives so that neither is destitute should we break up."

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