



## Special Considerations in Planning for Non-Traditional Families

By: Tanya D. Simpson, JD, MBA



In today's rapidly changing legal, political and economic climate, non-traditional families are increasingly seeking the counsel of estate planning attorneys to help them navigate through the often conflicting federal and state recognition of their relationships. We as WealthCounsel attorneys need not fear to tackle these issues, as we are particularly well equipped to design and build good, strong plans for these families. We have a very well outfitted toolbox, and we know how to use most of the tools already. Planning for non-traditional families is simply a matter of applying logic and our good knowledge of what each tool can and cannot do, and then structuring the pieces in a way that is most beneficial to these families.

Careful consideration of the following issues combined with logical implementation of the planning tools with which we are already familiar should lead us well on our way to creating well-drafted plans.

### What is a non-traditional family?

For the purposes of planning, a non-traditional family is any family unit that has at its center a partnership other than a legally married, opposite-sex couple. While we can imagine a whole host of family arrangements that may also be considered non-traditional (such as a single parent with children, siblings living together, separated couples who choose not to divorce, etc.), the following non-traditional families face particular challenges due to inconsistent and lacking legal recognition of their family status:

- same-sex or non-traditional gender partners who are prohibited by law from marrying;
- same-sex or non-traditional gender partners who are legally married according to a state's law;
- opposite-sex partners who choose not to marry for any number of reasons.

### How are non-traditional families taxed differently?

The single biggest difference in planning for non-traditional families is the unavailability of the marital deduction as a safety net. Married couples can give money to each other, combine their income and assets, name each other as life insurance and retirement plan beneficiaries, and hold property and bank accounts jointly with rights of survivorship, largely without consequence or concern.

Unmarried partners are not allowed this benefit. This means that if one partner contributes more to the household than the other, and an effective plan is not in place, the IRS could look upon the one partner's greater contribution as a gift to the other, possibly triggering a surprise gift tax bill.

Another tax trap that awaits non-traditional families is the generation skipping transfer tax. Unmarried partners who are not close in age are more vulnerable to the GSTT. While married couples are considered to be in the same generation regardless of age, unmarried partners whose ages are more than 12.5 years apart are considered to be one generation removed from each other. If this non-traditional family also includes the younger partner's children, any gift from the older partner to the child is treated as if it had skipped a generation and is subject to the GSTT. If the partners are more than 37.5 years apart, any gift from either partner to the other is subject to the GSTT, just as if the younger partner were the older partner's grandchild.

### How should non-traditional partners hold property?

Most non-traditional partners come to the table with the assumption that joint tenancy with right of survivorship is the obvious and best way for them to hold title to their property to ensure efficient transfer of their jointly held property outside of probate. This is not always the best choice.

For married couples who hold property as joint tenants with rights of survivorship, one half of the value of the property is included in the estate of the first partner to die.

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In contrast, for unmarried partners who hold property as Joint Tenants with Rights of Survivorship, the entire value of the property is included in the estate of the first partner to die, unless the surviving partner can prove his or her contribution in acquiring the property (consideration) or that the property was a gift to both partners equally. The burden of proving the origin of the funds that went into the down payment, mortgage payments, and improvements to the house is on the surviving partner and can be very difficult to establish.

While this difference may sound like a disadvantage, there is an advantage that can sometimes outweigh the cost if the property is highly appreciated and the deceased partner supplied most or all of the consideration. This is because the surviving partner will receive a full step up in basis, resulting in 100% of the appreciation of the property between the time it was acquired until the deceased partner's death not being subject to capital gains tax. However, the downside is that the surviving partner's interest in the property is potentially exposed to estate tax twice: once due to inclusion in the deceased partner's estate, and again when the surviving partner dies.

How property is titled can also affect property taxes. For example, in Florida, the transfer of property between married partners does not trigger reassessment for property tax purposes. However, the transfer of property between unmarried partners can trigger reassessment for property tax purposes. There is an exception if the property is held in joint tenancy and an original owner remains on the title. However, if one partner owns property and adds the other partner to the title, and the original owner dies first, the property will be subject to reassessment for property tax purposes even though the property was held in joint tenancy. There may also be homestead issues to consider in your particular state.

Determining the best way for unmarried partners to hold property depends on current federal and state laws, market conditions, and the partners' individual circumstances, and is not the simple answer your clients probably assume it is.

## **The special importance of living wills, health care directives and powers of attorney.**

If two people are not legally married, not related by blood,

and not in a partnership that is legally recognized by the state where they live, or often in the state where they are travelling, then the partners are legal strangers in that state. The ongoing Florida case of *Langbehn v. Jackson Memorial Hospital* arose when a non-traditional family from Washington state suffered the tragic illness and death of one of the partners while vacationing in Florida, and the even greater tragedy of the Florida hospital not allowing the family to visit the dying partner and parent or even receive medical updates until a blood relative arrived.

Traditionally, if a spouse dies or becomes mentally or physically incapacitated, state statutes allow the other spouse to make health care decisions and carry on the affairs of the family unit with minimal to no state intervention. In contrast, if an unmarried partner dies or becomes incapacitated, many states will look to the partner's other relatives as the only legal family. This can have devastating consequences for the partners and any minor children. Estranged relatives may suddenly have complete control not only of health care decisions, but also of the children, the family home, the family property, and even the family pets. The partner will have little to no legal recourse to keep the family together. In many states, the partner doesn't even have the right to temporarily possess the family home while things get sorted out.

Because of the legal uncertainty from state to state, it is essential that non-traditional families execute living wills, health care proxies, HIPAA authorizations, and durable financial powers of attorney, even if you practice in a state where non-traditional families are recognized. It is a very good idea for them to register their health care directives with Legal Directives, DocuBank, or a similar organization and carry their cards with them at all times, particularly if traveling out of state. Consent forms to authorize medical care for children, to pick children up from school, etc., should also be on file with children's schools.

## **Domestic Partnership Agreements aren't just for family law attorneys.**

A Domestic Partnership or Life Partnership agreement can be very helpful in establishing the parameters of the partners' non-traditional arrangement. This holds true whether they are a same-sex or opposite-sex couple, or even if two people are comingling their affairs in a non-romantic rela-

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tionship. If the partners are living together, own property or substantial assets together, or are comingling their finances, a Life Partnership Agreement will allow them to contractually establish

- how real property is owned and titled, who owns what percent of the property, and how additional contributions or payment of expenses affect the balance of ownership;
- whether income, gifts or inheritance of one partner during the partnership belong to that partner individually or to the partners together;
- how household expenses and duties will be handled;
- how financial support and division of property will be determined in the event the relationship ends;
- whether and how mediation can be used to settle disputes.

While no one wants to think about a relationship ending, a Life Partnership Agreement can be considered an “insurance policy” – you hope they’ll never need it, but having such an agreement allows the partners to go about their lives with peace of mind that they have a plan in place.

Additionally, a Life Partnership Agreement is not just about planning for separation. A Life Partnership Agreement can serve as valuable evidence in court of the committed relationship in the event that it is ever questioned. It can document the partners’ intentions regarding property and income that may have important tax consequences. A Life Partnership Agreement can also be a valuable planning tool for the partners to think through the responsibilities of day-to-day living to avoid misunderstandings down the road.

## Valuable planning tools for children in non-traditional families.

Just as a Life Partnership Agreement can document the partners’ relationship, a Parenting Agreement can serve as important evidence in court of how the partners and any biological parents have agreed to share the care and financial responsibilities of any children. It is important to counsel clients that in most states, courts are not bound by Parenting Agreements; they are bound by law to protect the

best interest of the child. However, if a surviving partner can present the court with a parenting agreement that shows that two or more interested parents have considered the best interest of the child and have a plan in place, the court will likely be more inclined to consider the partners’ wishes. Also, like a Life Partnership Agreement, a Parenting Agreement can be a valuable tool to help the partners to think through the multitude of day-to-day issues that surround the care and responsibilities of raising children.

*Tanya D. Simpson established The Manors Law Firm to serve the estate planning needs of Florida’s diverse families in today’s rapidly changing legal, political and economic climate. The firm’s mantra is simple: We help ALL of Florida’s individuals and families plan ahead to protect and secure themselves and their loved ones. Ms. Simpson holds a Juris Doctrate from Florida State University College of Law, where she was a member and twice-published author of the college’s prestigious Law Review, and a twice-competing member of the college’s award-winning Moot Court team. She also holds a Master of Business Administration from the University of San Diego, and had a successful career since 1987 in the business and investing fields prior to entering the field of law. For further information or to contact Ms. Simpson, please visit her website at [www.ManorsLaw.com](http://www.ManorsLaw.com).*