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Client Alert

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Planning Considerations for Unmarried Couples

Committed couples are increasingly moving in together, sharing joint assets and expenses, and having children without entering into a formal legal relationship. According the U.S. Census Bureau, the number of unmarried, cohabiting couples in the United States has nearly doubled in the last decade. This trend encompasses young couples moving in together for the first time, older couples who have previously divorced a spouse or been widowed, and couples wishing to retain or maximize certain financial benefits. Since they are not subject to the rights and obligations that accompany a marital relationship, partners committing to a serious relationship should consider the need to affirmatively plan for themselves, each other, and any children. This alert addresses the issues that committed, unmarried partners should be aware of, and suggests planning steps that both partners should consider taking towards ensuring protection.

- *Problematic issues*. Since federal and state law do not always automatically recognize relationships that have not been legally formalized, an unmarried couple is unlikely to have the benefit of default legal protections or be subject to default legal obligations concerning their relationship. In many cases, the law favors married couples and presents uncertainty for unmarried couples, including:
  - *Property and state law.* Legal marriage establishes access to many benefits and default rules, particularly in cases of serious life changes such as a break up, incapacity, and death. The rights of individuals in non-marital relationships, however, vary under state law. While some states recognize common law marriage (under which a couple who shares assets and lives together for a certain number of years effectively becomes "married" under the law), a majority of states, including Illinois, do not. Illinois courts have showed reluctance to recognize any marriage-like relationship in the absence of some type of formalized contract or relationship, such as a marriage or a civil union.
  - *Tax benefits.* An unmarried couple does not benefit from the U.S. gift and estate tax marital deduction rules for married couples, which permit unlimited tax-free transfers of assets between U.S. citizen spouses during life and upon death. As such, transfers of assets between partners may be subject to gift tax reporting during life and estate tax upon death. Other tax rules, such as those concerning distribution of individual retirement accounts and the ability to jointly file income taxes, also uniquely favor spouses.
  - *Miscellaneous benefits*. Eligibility for various benefits at the federal, state, and employer levels, such as Social Security, retirement, and health care benefits, often depends upon marital status.
- *Ensuring protections for life changes.* A committed couple should consider whether they wish to formalize any aspects of their relationship using estate planning and related documents. Adequate documentation can enable the couple to avoid the potential consequences of having no legal relationship, such as costly court battles, while ensuring that their intentions are upheld in the event of life changes. A couple must plan for various stages and potential changes in their lives together, including:
  - *Relationship*. How the partners will share and divide: (i) responsibility for their common and respective financial needs, and (ii) the ownership of assets, during their joint lifetimes. The couple should also consider how they might adjust their current arrangements in the case of any significant changes in income, health, and family; for example, if they plan to have or adopt a child.
  - *Break up.* How the partners will divide: (i) responsibility for their respective financial needs, (ii) the ownership of any shared assets, and (iii) allocation of any joint indebtedness, in the case of termination of the relationship. Unlike marriage, most state laws do not provide default rules for the division of responsibility and ownership for non-formal relationships, and it is uncertain how a court might rule in any given case, particularly in the absence of any formal arrangement.

- *Incapacity*. How the partners will cope if one of them becomes incapacitated or otherwise unable to act during his or her lifetime. In the absence of proper advance planning, the competent partner could be denied authority over the incapacitated partner's assets and health care decisions.
- *Death.* How the assets of each partner should be distributed upon death. In the absence of proper estate planning documents, titling, and beneficiary designations, the property of an unmarried person would pass by intestacy to his or her family members as heirs in accordance with state law.

- *Action items menu.* An unmarried couple may effectively create their own rules for the control and disposition of assets, which operate independently of their legal relationship. Although some legal benefits are only available to married spouses, unmarried partners may choose from a menu of legal rights and obligations as they consider appropriate for their specific circumstances and relationship. A committed couple should consider taking a number of steps in order to provide for their personal and financial goals during life and upon death, including:
  - *Powers of attorney.* Execute up-to-date and durable property and health care powers of attorney, which can provide your partner with access, decision-making authority, and control, both currently and in the case of incapacity.
  - *Estate planning documents*. Execute a will and trust that provide for the surviving partner and any other desired family members, friends, or charitable organizations to receive your property upon your death.
  - *Cohabitation or property agreement*. Use a written agreement to address each partner's respective rights and responsibilities. A cohabitation or property agreement may be used to: (i) delegate responsibility, share expenses, and plan for changes to the status quo during the relationship, and/or (ii) address the division and disposition of assets in case of a break up. Each partner should be represented by separate counsel in making such an agreement.
  - *Titling.* Title real estate and any other joint assets to provide for survivorship rights.
  - *Beneficiary designations*. Specifically complete beneficiary designations for assets such as retirement accounts and life insurance policies.
  - *Recordkeeping.* Track each partner's respective income and payments of expenses during the relationship, especially contributions to joint assets.
  - *Tax planning*. Consider whether you can utilize strategies for deferring or saving transfer taxes.
  - *Alternative entities*. As an alternative to a cohabitation agreement, enter into a structured non-relationship-based legal entity, such as a limited liability company, to address your respective financial rights and obligations.
  - *Relatives' documents*. Family members of unmarried couples may wish to draft their estate planning documents to specifically provide for non-marital partners, as well as broadly defining the terms "spouses" and "children" to include non-marital partners and children of non-marital relationships.
  - *Update plan.* If the legal landscape or your legal relationship changes, reconsider whether you will be properly protected and if updates to your planning documents are required.
- *No promises.* Communicating with your partner about your expectations and intentions is important, however, never assume that you can rely upon your partner's oral representations and promises in the case of a break up, incapacity, or death. You should memorialize all significant agreements with your partner in writing.

For More Information

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