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The Legal Dangers of Living Together

An estate planning lawyer's cautionary advice for unmarried couples

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For couples over 50, living together has a lot of appeal and is on the rise. In fact, the number of unmarried couples who are 50+ shot up 75% between 2007 and 2016, according to the U.S. Census Bureau. One likely reason: many have experienced at least one difficult divorce, so they're gun-shy about remarrying and potential legal entanglements if thing don't work out.

Unfortunately, however, as with many things in life, what seems simple — living together — is often quite complex. Unmarried couples, of all sexual orientations, can face a variety of problematic and emotionally difficult issues because estate planning laws are written to favor married couples.

Living Together: 'Legal Strangers'

Consider for example, what will happen if an unmarried couple doesn't plan for the possibility that one partner will no longer be able to manage his or her health care due to a serious medical issue. At that point, the law will treat the other partner very harshly.

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For example, if a married person is rushed to the hospital unconscious and hadn't prepared a health care power of attorney giving the other spouse the right to make medical decisions on his or her behalf, that husband or wife will probably be allowed to make them anyway. But if an unmarried couple is in this same situation, the law will consider them to be "legal strangers." Therefore, the partner who is not incapacitated will have no right to make medical decision on behalf of the other.

Now, certainly there *might* be a hospital willing to bend the rules in this situation, but it's unlikely. By doing so, the hospital would expose itself to liability issues should a blood relative of the incapacitated person — a sibling or an adult child, for example — challenge the medical facility's decision.

When Money Is Imbalanced

Another serious financial problem could arise when an unmarried partner becomes incapacitated without proper estate planning. Say the couple consists of an older, wealthier partner and someone substantially younger and they have an understanding that the older partner will support their lifestyle. Then, suddenly, the older partner becomes ill and can no longer manage the couple's finances.

Under such a scenario, unless the older partner had given the younger one financial power of attorney, that older partner assets will probably be frozen by his or her financial institutions; the younger partner won't be able to access them. Furthermore, a court action might be necessary to unfreeze the assets, which would take time and money.

Without appropriate advance planning on the part of the ill partner, courts are generally forced to rely on blood kin to fil financial and medical decision-making roles. The younger partner would lose control of those assets and could even be evicted if the couple's home is owned solely by the partner who is ill and no longer able to manage their finances.

Both of those scenarios could have been avoided if the unmarried partners had executed key estate-planning documents while they were healthy and competent, including a durable power of attorney, a medical power of attorney and a living will (which applies to end-of-life decisions). Many states call the latter two documents advanced health care directives o health care proxies. A living trust could also have helped avoid the problematic financial issues.

The Need for a HIPAA Release

Unmarried couples also need to get signed HIPAA releases. HIPAA is a federal health privacy law that prevents medica facilities and health care professionals from sharing a patient's medical information with anyone not designated on the person's HIPAA release form. You can find HIPAA release forms online, but it's best to get them from estate planning attorneys to ensure they're up-to-date and correct.

Unmarried couples can also face difficult legal situations when one of them dies. Without the proper legal documents, th surviving partner won't be entitled to make decisions regarding the donation of the deceased's organs or arrange for the person's burial or cremation. These problems can be avoided either by pre-planning through a funeral provider or — if their state allows — by signing a document giving the other partner the right to make final arrangements on behalf of th deceased.

Living Together and Then Dying Without a Will

Here's another potential problem for unmarried couples: If the deceased failed to write a will or set up a living trust, the state will distribute his or her assets and what are known as intestate laws (for people who die without wills) don't

recognize a surviving unmarried partner. Therefore, he or she won't be legally entitled to inherit any of the assets. Instead, they'll go to the deceased's blood relatives, such as his or her children or siblings.

By contrast, if a *married* partner dies without a will or a living trust in a community property state, the surviving spouse automatically entitled to inherit as much as half the value of the deceased's assets. (Those states are Arizona, California Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.) In other states, the surviving spouse would be entitled to receive an "elective share," a part of the estate that the surviving spouse can "elect" or choose to receive.

Home, Not-So-Sweet Home

Then there's the matter of a couple's home.

Although laws in some states give a surviving spouse the automatic right to occupy the couple's home for life, that's not the case for a surviving unmarried partner.

An unmarried couple could avoid this problem if the partner who owns their residence gives the other this right by specifying it in their will or living trust. Also, in some states, if the unmarried homeowner has a Transfer on Death deed, the home would automatically go to the other partner. One caveat: if the owner partner became incapacitated, the only way the other one would have a legal right to remain in the home during the incapacity would be if this was spelled out in a living trust.

401(k)s, Life insurance and IRAs

What about retirement funds and life insurance proceeds?

Sadly, if an unmarried partner owned assets like a 401(k) or a employer-sponsored group life insurance policy and died, the other partner won't be legally entitled to those assets unless he or she was designated as the beneficiary. Otherwise, the assets will go to the deceased's blood relatives. Of course, if the couple were married, the surviving *spouse* would automatically be entitled to funds in the deceased's 401k and proceeds from the life insurance, unless someone else was named a beneficiary.

Beneficiary designations also control Individual Retirement Accounts (IRAs) and privately-owned life insurance. So, unless the unmarried partner is named as the beneficiary for those, he or she won't be entitled to those funds either.

The lesson for couples living together: protect your finances and your emotional health by getting your estate-planning documents in order.