

Estate Planning for Unmarried Persons: How It Is Different

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Introduction and Stats



Singles

- About 50.2 **percent** or 124.6 million American adults are **single**—in 1950, that number sat around 22 **percent**. <https://www.wnycstudios.org> ›
- In 2020, approximately 36.2 million **people** were living in **single-person** households in the United States. May 18, 2021 <https://www.statista.com> › [Society](#) › [Demographics](#)
- <https://www.unmarried.org/statistics/> notes the following:
 - 39.2% of the unmarried population aged 18 and older were formerly married and 60.8% have always been single – U.S. Census Bureau’s Current Population Survey (CPS), 2008.
 - 68% of divorced or widowed Americans plan to remain unmarried. – Gallup. 2006.
 - As of 2000, the most common household type in the U.S. is a person living alone. – Hobbs, Frank. 2005. “Examining American Household Composition: 1990 and 2000.” U.S. Census Bureau.
 - 39.7% of all births are to unmarried women. – National Center for Health Statistics. 2007.
 - About two-fifths of children are expected to live in a cohabiting household at some point. – U.S. Census Bureau. 2000.

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Ethical Considerations



Attorney Ethics Consideration: ABA Rule 1.7: Conflict of Interest: Current Clients - Comments

- Although it is common practice for lawyers to represent both spouses in their estate planning, conflicts may arise (probably heightened if at least one of them has a descendant of a different union), which preclude the lawyer from representing both.
- This conflict almost never would arise if representing a single client, although other conflicts may.
- Also, conflicts may well arise if the representation is of a unmarried couple who essentially live as a married couple would, especially if one of them has a descendant of another union.
 - It is best to inform the couple of the possibility of a conflict later arising.
 - “...each affected client gives informed consent, confirmed in writing...”

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Income Tax Considerations



Income Tax

- IRAs and Qualified Plans

- QCDs during life are tax-efficient
- Naming a charity as beneficiary is tax-efficient
- No spousal rollover -> plan must be in place
- Minimizing Income Tax
 - Life Insurance to reduce the increased risk of early death
 - Charitable Remainder Trust as beneficiary
 - Roth conversions to avoid the inefficient 691(c) deduction and to improve the efficiency of GST allocations
 - Naming a trust, subject to no state income tax, as beneficiary

Income Tax

- Certain tax losses & deductions “die” with the taxpayer
 - Capital losses not used on the final 1040 are lost
 - Net operating losses not used on the final 1040 are lost
 - Passive activity losses in excess of the basis “step-up” not used on the final 1040 are lost
 - Charitable deductions, including carryforwards, not used due to the percentage limitations are lost

A married taxpayer can count on their surviving spouse to capture these benefits, by selling assets in the same tax year as the first death.

A single taxpayer doesn't have this luxury.

Income Tax

- Annuities at Death
 - Post-mortem payment options must be identified and evaluated
- S-Corporation Preservation
 - An insufficient estate plan can leave a S-Corporation “Homeless” and unable to maintain the S-election

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Status



Single Singles

- Single clients that are alone planning takes on a lens that is quite different than married clients, and even than clients who, although unmarried may have a significant other.
- Planning for the single client requires addressing creating a safety net and identifying fiduciaries and other persons.

Common Law Marriages

- A common law marriage is a legally recognized marriage between two people who have not purchased a marriage license and have not gone through a marriage ceremony. Such a marriage will be recognized for federal purposes, including for tax purposes (e.g., allowing the marital deduction).
- Currently, eight US states recognize common law marriages (Colorado, Texas, Montana, Iowa, Kansas, New Hampshire, Utah, South Carolina). But many others previously recognized common law marriages and the marriage will still be recognized for most legal purposes.
- A couple likely can enter a common law marriage while in one of the eight states even if they otherwise reside in a state that doesn't recognize such marriages if "made" in that state.

Single but Living Together with Significant Other(s)

- Consider recommending a living together agreement.
- Pros/cons/issues.
- Matters to address.

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Parenting and Children for the Single Client



The Question of Parenthood. Do You Dare Ask?

Parenthood

- a. Traditional: Married couple; non-married couple (“[A]mong women under 30, more than one-half of all births happened outside of marriage*** Women without a bachelor’s degree had children earlier and were typically unmarried—74 percent gave birth at least once without a husband.”)
- b. Uniform Parentage Act: “A man is presumed to be the father of a child if . . . [h]e and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation]....” What about DNA? The interest of the state.
- c. Genetic parenthood vs. marriage parenthood (accidental surrogacy of embryo)
- d. Waivers of genetic parenthood rights
 - i. Pre-death
 - ii. Post-death
- e. Legal parenthood vs. parent by estoppel vs. de facto parenthood. American Law Institute, Principles of the Law of Family Dissolution: Analysis & Recommendations, Sec. 2.03(1) (2002).
- f. Forced parenthood
- g. Children *in utero*: married to father; not married to father

Custody and Child Support in Unmarried Families

- Custody
- Child support
- Other considerations

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Estate Planning



Ways in Which Estate Planning for Single People Is Different - 1

- Perhaps, the greatest challenge is to get the unmarried person to take action, especially if they do not have descendants.
- Although there are exceptions, most of the law, property, government entitlements and tax law tend to favor married persons.
 - A spouse who is not covered by social security based upon his or her own work and payment of FICA nonetheless succeeds to Medicare and Social Security payments based upon their spouse being covered. For example, a 65 year old husband, who is not covered on his own, is entitled to Medicare coverage based upon his spouse's coverage even if the spouse is not 65 (e.g., the spouse is only 49).
 - On the other hand, a person may be denied government benefits (e.g., Medicaid) by reason of their spouse's income or resources. Divorce may "cure" this disadvantage but that is a very difficult step for many couples to take. Also, a trust created by one spouse for another during lifetime may disqualify the spouse from receiving governmental benefits.
 - Each spouse is required by law to support the other. This likely cannot always be waived (as the state wants to protect itself from having to support the "former" spouse) although it will end on the death of either spouse except to the extent they have contracted otherwise.
 - All states (other than Georgia) provide for a surviving spouse to succeed to property of the deceased spouse although the percentage, amount and type of property varies widely, often turning on the residency of the spouse first to die. (Keep in mind that community property provides no property interest for the survivor if there is no community property held by the couple at death.)
 - Divorce (or annulment) may provide property rights (dependent upon the state of domicile for the couple) and entitlement to maintenance.

Ways in Which Estate Planning for Single People Is Different - 2

- The “double” step-up in basis under Section 1014(b)(6) is a tremendous advantage for a surviving spouse especially because all estate tax can be avoided when the first spouse dies (by reason of the marital deduction) under current law.
- The avoidance (actually, the postponement) of estate tax when the first spouse dies is a tremendous advantage.
- Much of the income tax law favors married couples (e.g., offset one spouse’s gains with the other losses) but not always. For example, if each spouse earns about the same amount of income as the other, their combined income tax likely will be greater than if they were single. Note that the \$10,000 SALT limitation is per married couple, another disadvantage of being married.

Estate Planning in General

Estate planning involves a significant number of financial and non-financial matters from planning for the orderly transmission of property at death, to planning for retirement, to providing for the education of descendants or other loved ones, to supporting charity or other causes.

Common estate planning goals

- a. Orderly transmission of wealth in accordance with the client's wishes.
- b. Minimizing post (and pre) death "squabbles" about wealth (or burial).
- c. Fostering a continuing "friendly" relationships among family members.
- d. Reducing costs of transmission including estate and related taxes.
- e. Protecting property from claims of creditors of the property owner and inheritors.
- f. Maintaining "family" values (whether political, religious or otherwise).

Each of these applies to unmarried people as well as married ones. If the client has no descendants, the client may not be certain as to where her wealth should be transmitted at death. Also, the client may be less concerned with reducing taxes. Note that much of Chapter 14 applies only with respect to property transferred to family members (which may include siblings and siblings-in-law but not descendants of brothers and sisters or more remote relatives) and does not apply to those unrelated.

Some Basics of Estate Planning for Single People

- Use the same basic documents as for married people: Health care proxy (whom to choose); power of attorney (whom to choose); Will; revocable trust (to better care for the client (whom to designate as the successor trustee). Some states permit designating the person to become the guardian if disability occurs. Watch out for undue influence which likely is reduced for a married person (subject to exceptions).
- Consider truly independent people as fiduciaries for the single person (especially if there are no descendants). This will be important be especially important in naming an attorney-in-fact.
- Watch out for addictions. There is no spouse who is the most likely person to notice this.
- Consider long-term care insurance.
- Discuss income tax reduction by having the person change domicile which often is easier if there is no spouse.
- Consider non-reciprocal SLAT type trusts. A SPAT may be better for each.

Single People Living Long Term with a Significant Other

- If marriage is in the cards, consider recommending a prenuptial agreement especially if either of them has descendants from another union.
- Consider estate tax planning for single people before the marriage—e.g., old style GRITs; preferred freezes; avoiding self-dealing issues under Section 4941 and avoiding attribution from one's spouse for excess business holding purposes under Section 4943.
- Create a non-grantor trust (no automatic grantor trust status as they may be for a spousal trust under Section 677). A SLAT for a spouse may be ugly if there is a divorce.
- Consider a partnership so the “other” may succeed to property at death without estate tax.
- Unlike a spouse, a significant other may not be in the same generation for GST tax purposes.
- Cannot give residence to “other” and continue to live there—Cf. Estate of Gutches, 46 T.C. 554 (1966), acq. 1967-1 C. B. 2.

Single People Not Living with a Significant Other

- Consider a SLAT (for “spouse” but “sibling” or other relative).
- Consider estate tax planning for single people before the marriage—e.g., old style GRITs; preferred freezes; avoiding self-dealing issues under Section 4941 and avoiding attribution from one’s spouse for excess business holding purposes under Section 4943.
- Create a non-grantor trust (no automatic grantor trust status as they may be for a spousal trust under Section 677).
- Consider long-term care insurance.
- Discuss income tax reduction by having the person change domicile which often is easier if there is no spouse.
- Be prepared for Will contest by blood relatives. Consider premortem probate.

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Planning for Older Singles



Planning for Elderly Single Clients

Elderly and chronically ill clients without the safety net of a spouse, siblings or other close family member to rely on for help, need to a different approach to planning, one component of which may be to designate “outside” fiduciaries. This requires special documentation and different planning. Those clients are referred to as the “isolated” vulnerable client.

The number of divorces among older Americans has grown rapidly and such divorces have even earned a nickname, the “silver divorce.” Since 1990, the divorce rate for Americans over the age of 50 has doubled, and more than doubled for those over the age of 65. This trend suggests a growing number of singles.

The fastest growing demographic segment of the American population is those 85 years and older. In 2010, there were 5.8 million people aged 85 or older. By 2050, it is estimated that there will be 19 million people in that group. Many of those in this age bracket will become single as the result of the death of their spouse.

Elder financial abuse is a significant problem for the aging client, and as more clients continue to age, the statistics will grow worse, absent planning. According to one study, major financial exploitation occurred at a rate of 41 per 1,000. Practitioners need to proactively help clients build a planning team and address this widespread risk.

Planning for Elderly Single Clients

- If a client is single, perhaps has no immediate family, then traditional planning will not suffice. Planning for someone without a base of relationships that can be safely tapped to serve as fiduciaries presents unique challenges. The modifications or additional steps to better safeguard vulnerable or isolated clients can be viewed as comprising four different categories.
- Conventional estate planning often presumes that the client has a safety net and several trustworthy family members, especially a spouse and children, to designate as fiduciaries. The reality is often quite different.
- Only about 20% of people currently live in a nuclear family (married with children). Much of estate planning literature presumes the presence of nuclear families.
- The single woman over 85 is one of the fastest growing demographic categories in the United States. According to the U.S. Census Bureau, about 700,000 women are widowed each year and they will be widows for an average of 14 years. Men are also becoming widowers at increasingly higher rates. With advancing age, widowers and widows will find that their friends and siblings are also dying or are facing the same health or aging challenges as they are. As a result, many of those facing the challenges of chronic illness or aging, or as often will be the case both, will have few or no spouse or even close family members and are otherwise becoming increasingly isolated from their wider family.
- The burgeoning growth in elder financial abuse highlights the importance of proper precautionary measures. This emphasizes the need to more carefully guide clients in their selection of agents and other fiduciaries and to design safeguards against abuse by those eventually selected.

Planning for Elderly Single Clients

- Engage the single elderly client in a conversation as to the advisability of choosing a particular person to serve in a fiduciary capacity. How long is their relationship with the nominee? What is the financial status of the agent being considered? Does the candidate-agent have drug, gambling, criminal or other issues that might make naming her or him inadvisable? Is the client's relationship with the suggested designee realistically close? Is the client certain about that? Does the candidate-agent have the sophistication to serve? What is the candidate's age and health status?
- More than a few clients have an initial negative reaction to naming a corporate fiduciary. Often their concern is based on a perception as to the incremental costs or a corporate fiduciary's rigidity. These perceived issues are ones practitioners aptly can address by educating clients as to how corporate fiduciaries approach their job and what can be included in estate planning documents to guide such fiduciaries in their decision making.
- Existing, long term relationships between a client and a bank or trust company with a full array of fiduciary services can serve as the keystone of the single, vulnerable or isolated client's safety net. What needs to be done in such cases is to take advantage and expand on the utilization of those services. The gist of such planning is to put a structure in place to address the added and changing needs of the client.
- The keystone of the single client's estate plan may include a funded revocable trust, and a corporate trustee named as a current or successor trustee.

Planning for Elderly Single Clients

- If state law permits, an isolated client with no family or friends to name as an agent may be able to hire (contractually designate) a professional, paid health care agent to act on his or her behalf. If this approach is used, the revocable trust could direct the successor trustee to pay the fees of, and costs incurred by, such a professional health care surrogate in carrying out the client's wishes. Those wishes should be specified in the agreement with the hired surrogate and also included in the client's living will.

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Conclusion and Contact



Conclusions

Planning for single clients requires addressing different concerns and risks to protect the client.

Many of the planning assumptions used for married clients simply do not apply or should not be applied without modification.

Thank you for your time, attention, and taking the time to learn about estate planning for beneficiaries with addiction. Please reach out with any questions or comments.

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