

ADVISING UNMARRIED COUPLES IN TRUSTS & ESTATES MATTERS

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OVERVIEW & AGENDA

- What rights does the law afford spouses that are unavailable to the unmarried couple?
- How can an unmarried couple plan ahead to account for these shortfalls?
- Can anything be done *post-mortem* for the survivor?

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FINAL ARRANGEMENTS

- In New York, only certain people have the authority to control the disposition of a decedent's remains. They include, in the following order of priority:
 - Surviving spouse or domestic partner
 - Adult children
 - Parents
 - Adult siblings

5 FINAL ARRANGEMENTS (CONT'D)

- Is the surviving partner a “domestic partner”? Are they registered with the City, County, or other government agency? Are they residing together? Financially and emotionally interdependent?
- What is the likelihood that a blood relative will try to assert rights?
- Will a funeral director refuse to take instruction from the surviving partner even absent a dispute with blood relatives?



TIPS 6

- Plan in advance with a pre-need burial/funeral payment
- Even better, sign the form in Public Health Law § 4201
- Avoid relying on language in the Will – not effective until probate

7 STANDING TO CHALLENGE WILL

- Only those adversely interested by probating the Will can object to same. This includes all intestate distributees and beneficiaries under prior Wills
 - Surviving spouse and/or children
 - Parents
 - Siblings
 - Nieces & nephews

8 WILL CHALLENGE (CONT'D)

- If deceased partner has children, children are closest distributees. Court will appoint a Guardian Ad Litem if they are minors
- If deceased partner is childless, survivor may be dealing with parents, siblings, or more remote relatives. May need to hire genealogist to identify distributees

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WILL CHALLENGE (CONT'D)

- Probate contest could take months or years (average = 18-24 months)
- Surviving partner can finance litigation costs from Estate assets if nominated Executor and bondable (required in some counties), but cannot distribute assets to self to finance everyday living costs



TIPS 10

- Have unmarried clients identify all distributees
- Frank conversation about likelihood of a contest
- Ensure non-probate assets for availability to surviving partner or avoid probate altogether

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INTESTACY

- Intestacy only protects surviving spouses and those who are related to the Decedent by blood – the survivor of an unmarried couple is not a distributee
- Surviving partner is also not a distributee – no right to receive Letters of Administration
- If no distributees come forward, reporting death to the Public Administrator may be necessary

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INTESTACY (CONT'D)

- If the surviving and deceased partner shared a residence or safe deposit box, questions will arise concerning the owner of each item. No right to family exempt property in EPTL § 5-3.1(a)
- If there is a common bank account, the fiduciary may question whether the deceased intended it to have survivorship provisions or not
- Surviving partner may need to present claim for funeral and other expenses s/he advanced pending fiduciary appointment



TIPS 13

- Identify tangibles owned by decedent vs by survivor
- Review signature cards and bank records for all common accounts
- Identify potential claims against Estate and file timely

14 (UN)MARRIED WITH CHILDREN ...

- When the unmarried couple has children and one partner dies intestate, the children are distributees, but the spouse is not
- Surviving partner has no standing to receive Letters of Administration, even though his/her own children may be the sole beneficiaries
- Adult children may receive Letters of Administration if they qualify

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KIDS (CONT'D)

- Children born out of wedlock may need to prove kinship pursuant to EPTL § 4-1.2
- Minors inheriting through intestacy subject to SCPA Article 17 guardianship proceeding – inherit all funds outright at age 18; Court permission for withdrawals to pay expenses



TIPS 16

- Avoid direct inheritance by minors with trusts or custodial accounts
- Consider having client sign acknowledgement of paternity for child born out of wedlock
- Advise concerning adoption options for non-biological parent

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ESTATE TAX

- Unmarried couples are not entitled to the marital deduction for assets they leave to one another – fully included in the gross taxable estate
- Similarly, unmarried couples cannot leave assets in a lifetime trust (such as a QTIP or QDOT) for their surviving partner and defer taxation until a later date

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ESTATE TAX

- Assets own jointly between non-spouses come with a presumption in IRC § 2040 that the entire asset is subject to taxation in Estate of first owner – unless survivor can prove otherwise
- Filing and payment date for estate taxes is 9 months after date of death. Extensions available, but interest on late payments begins to accrue

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ESTATE TAX

- Good news: with recent modifications to the Federal and NYS estate tax exemption amounts (presently \$5.45 million and \$4,187,500, respectively), very few Estates subject to estate taxation
- Bad news: a surviving partner of an unmarried cannot inherit the decedent's unused Federal exemption amount – likely increasing the total assets subject to taxation in survivor's Estate with only one available exemption



TIPS 20

- Identify potentially taxable estates during the planning stage
- Alert clients with illiquid estates (real property, business interests, etc.) 9 month due date
- Consider purchasing life insurance to provide liquidity



TIPS ²¹

- Ask clients to produce papers for all jointly-owned assets to try to prove contribution
- Advise clients concerning estate tax planning vehicles, such as charitable remainder trusts