

# **ESTATE PLANNING ISSUES FOR NON-TRADITIONAL COUPLES**

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# INTRODUCTION

## YOU AND YOUR PARTNER ARE “LEGAL STRANGERS”

- BURIAL DETERMINATION
- CLAIM TO THE BODY
- MEDICAL DECISIONS REGARDING TREATMENT, PLACEMENT AND PROVIDERS
- INTRUSIVE MENTAL HEALTH DECISIONS
- ORGAN DONATION
- HOSPITAL, NURSING HOME AND PRISON VISITATION
- PRESUMPTION OF GUARDIAN
- CHILD CUSTODY, CHILD SUPPORT AND VISITATION
- JOINT ADOPTION OR FOSTER CARE
- ATTORNEY-CLIENT PRIVILEGE
- MARITAL COMMUNICATION
- WRONGFUL DEATH
- SEPARATE MAINTENANCE OR ALIMONY
- PROPERTY DIVISION WHEN RELATIONSHIP ENDS
- INHERITANCE
- SOCIAL SECURITY BENEFITS
- VETERANS' BENEFITS

## WILLS

- **Enable you to express your wishes about the disposition of your estate after death.**
- **Trumps the state intestate plan.**
- **Ensures property held in the name of only one partner passes to the surviving partner.**
- **Should include a clause expressing intention to benefit the surviving partner over the biological family and the reason for doing so.**
- **Pets' care after death can be ensured.**

### **Example from Florida on importance of a Will for non-traditional couples:**

A gay couple lived in a committed relationship for years. All assets, including the house, bank accounts were in the name of only one partner. He became ill and died without a will.

After the funeral, the decedent's family encouraged the surviving partner to take a walk on the beach. While he was gone, the family changed the locks, emptied the contents of the house, and took the couple's dog to an animal shelter in another county. When the surviving partner returned, he was told the house was not his, he could no longer live there, and everything in it belonged to the decedent's family—including his own clothing. They also refused to tell him where they took his dog.

This horrible story is not unique AND it could have been avoided if the parties had executed wills or other documents providing for disposition of the estate.

### **Reasons people give for not making their wills:**

- ❖ I'll die if I make my will.
- ❖ I'm too young to need a will.
- ❖ I don't have a lot of money or property.
- ❖ I can't afford a lawyer.

## TRUSTS

- **Provide protection and privacy.**
- **Can protect privacy of both relationship and assets.**
- **More difficult for unhappy family members to contest.**
- **Not subject to Probate court.**
- **Eliminates need for ancillary estates when real estate is owned out-of-state.**
- **Can offer significant benefit if grantor becomes incompetent during his or her lifetime. Can eliminate the need for a guardianship.**
- **Can hold both shared and individually held property.**
- **Does not eliminate estate or death taxes.**

### **Different Types of Trusts:**

**Living trusts are made during the grantor's lifetime.**

#### **Revocable trusts:**

- **Have no gift, income, or estate tax consequences.**
- **Creditors can reach assets.**
- **Grantor maintains control over administration and enforcement.**

#### **Irrevocable trusts:**

- **Require the grantor to relinquish all rights to alter, amend, revoke, or terminate the trust.**
- **Creditors cannot reach assets.**
- **Grantor gives up all authority over trust.**

**Testamentary trusts take effect at the death of the grantor and must go through Probate.**

**Spendthrift trusts:**

- **Prevents the beneficiary from squandering the trust principal.**
- **Beneficiary is never the trustee.**
- **Beneficiary has no right to spend the trust principal or encumber the trust in any way.**
- **Prevents creditors from reaching trust assets.**

**Discretionary trusts:**

- **Often called “special needs” trust.**
- **Can serve the purpose of providing for surviving beneficiary.**
- **Trustee has the choice of distributing the proceeds to the beneficiary(ies).**
- **The document specifies when the trust will terminate and what happens to the assets in the trust at that time.**
- **Can be set up to compliment and not replace government benefits available due to illness.**
- **Trustee must be disinterested entity.**
- **Only certain class of people can establish the trust (i.e. guardian).**

### **Pet trusts:**

- **Can be established to care for pets after the owner's death.**
- **Can include specific property items like a house or car to be used for the care of the animal. The trust then provides for disposition of the property after the animal's death.**
- **Can be set up for a class of animals so that each pet does not need to be named individually.**
- **Must include guidelines for the pet's care, such as annual or monthly expenditure and method of payment for food, caretaker's fee, vet fees, and pet health insurance premiums.**
- **Can include stipulations on major decisions such as if and when the animal might be euthanized. The document can provide for a designated panel to make such decisions.**

<b>Tax Issues</b>
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- **Each partner must file as single taxpayer.**
- **Deductions can be examined and attributed to partner who would benefit more.**
- **Mortgage interest is one exception to claimed deduction: Only the person responsible for the mortgage can deduct the interest.**
- **Income-producing assets can be transferred to the partner with the lower income to provide tax relief.**
  - **Watch gift tax consequences**
  - **Do a written agreement prior to the transfer.**
- **Be sure to keep detailed records showing whose money belongs to whom in case of an audit.**

### **Gift taxes:**

- **Are an issue when one partner transfers property from his or her name into both names.**
- **Every person can make an annual gift up to \$12,000 to anyone. There is no limit on the number of \$12,000 gifts one person can make in any given year.**
- **Gifts exceeding \$12,000 must be reported on the federal gift tax return by April 15<sup>th</sup> of the following year.**
- **Gift tax does not apply for amounts paid on medical and educational expenses.**

### **Jointly held property:**

- **Even if held with rights of survivorship, the entire value will be included in the first partner's estate upon death for federal estate tax purposes.**
- **This can be rebutted with evidence of contribution by the surviving partner.**
- **This is not an issue for married couples.**

### **State death taxes:**

- **Married couples pay a 0% inheritance tax when their spouse dies.**
- **Non-married couples are "legal strangers" and pay the highest inheritance tax rate, currently 15%.**
- **This amount is levied against all property the surviving partner receives as a result of the other's death, including 1/2 the value of the residence if held jointly, and the entire value if owned individually by the deceased partner.**

## Medical Power of Attorney

- **Authorize your “legal stranger” partner to make medical decisions for you. Without one, an ill partner’s family has sole authority on visitation and medical decisions.**
- **Are important and should be taken along when travelling.**
- **Family should be informed of your decision and the existence of the medical power of attorney so that there is not surprise if needed to be used.**
- **Enables partner to have access to medical records and information. Authorizes physician to deal and inform partner directly.**

## Living Will

- **Expresses your wishes when you are not able to.**
- **Gives Medical decision-maker support when making decisions family might oppose.**
- **Eases the burden of the person making a difficult decision.**

## Financial Power of Attorney

- **Ensures the continuation of your affairs in your absence of during a disability.**
- **Can be used by couples to ensure that their bank accounts, property, and other assets are properly managed if they become unable to do so directly.**



- **Can eliminate the need for a guardianship.**
- **Is effective only during the lifetime of the grantor.**
- **Can be rescinded at anytime, preferably in writing.**
- **Can be recorded.**
- **Are very powerful documents.**

### **Funeral Arrangements**

- **Next of kin are authorized by law to make funeral arrangements.**
- **Family can override or exclude surviving partner without instructions from deceased partner.**
- **Pennsylvania has a statute that enables an individual to alter the “next of kin” plan by including funeral instructions in his or her last will and testament.**
- **It is a good idea to reinforce this testamentary paragraph with a separate writing and inform the family in advance.**
- **Issues include:**
  - **Right of control over the funeral.**
  - **Content of obituary.**
  - **Headstone selection and inscription.**
  - **Right to claim of the body.**
  - **Right to authorize or refuse an autopsy.**
  - **Disposition of remains.**

## Domestic Partnership Agreements

- **Are similar to prenuptial agreements.**
- **Are rarely executed before the start of a relationship.**
- **Are recommended if one partner supports the other or if there is significant mixing of financial assets.**
- **Includes a disclosure of assets, provisions regarding allocation of future property acquisitions, and provisions for current and future support.**
- **Describes procedure for resolving disputes, in particular the dissolution of the relationship and division of assets.**
- **Are governed by contract law and not family law.**
- **Can be used to define the relationship.**
- **Recites each party's responsibility and obligation to the relationship, including specific duties assumed by either partner.**
- **Useful in describing ownership status of property brought into the relationship.**
- **Parties should be identified as "partners" or "domestic partners" and not "lovers."**
- **Must state consideration for the contract and cannot use the relationship or sex as the consideration.**
- **Should include a provision for gifts between the parties.**
- **Should include confidentiality and privacy provisions.**
- **Can include a clause requiring counseling before terminating the relationship.**
- **Can include provisions for custody, visitation, and support of any pets.**