UNMARRIED INDIVIDUALS
AND
ESTATE PLANNING ISSUES

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As planners much of our work involves the married couple; we strategize for, among other things, to optimize tax savings, strike the balance between saving for the future and living for today, care for minor or disabled children, and trying to ensure that a client's objectives are understood and met, to the extent practical. That being said, a large part of the population remains, or becomes, "unmarried" for various reasons (by choice to never marry, divorce, death of a spouse). These clients have planning needs which in many ways are similar to their married counterparts but in many ways are vastly different due to their "single status".

The key planning points which remain the same regardless of one's marital status are that every plan should be unique to fit the individual's personal circumstances and second, a client will be better served by a holistic approach to their planning versus a single professional advising the client on all points involved with his/her plan. There certainly are other overlapping matters but these are the two foundational similarities.

Below are some considerations to consider in planning for various groups of single persons. Where a matter is addressed in a particular area it is purely because it is most associated with or most relevant to that group of people.

A. <u>Co-Habitation and Estate Planning</u>:

1. **<u>Statutory Rights</u>**: Washington statutory law does not provide legal rights for parties who elect not to marry but rather to live together in a committed relationship.

The only way to ensure a partner receives a portion of one's estate at death is to have a valid written instrument disposing of property at death (trust or will or titling property in such a way that it passes automatically upon death).

2. **Equitable Rights**: If there is no transfer of assets under one of the methods stated above, the surviving partner may attempt to receive property from the decedent's estate under a variety of equitable theories.

(a) **Meretricious Relationship**: The concept of Meretricious Relationship was first developed in the context of the dissolution of a relationship where the parties were unmarried but cohabitated together as a couple. The principal, which is a judicial doctrine based in equity, was adopted by Washington courts to make an equitable division of property that would have been community property if the couple had been married. A Meretricious Relationship has been defined by the Washington Supreme Court as "a stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist." In essence it's a facts and circumstance test (continuous cohabitation, length of relationship, pooling of resources, purpose of the relationship, and other facts of relevancy) with no one factor given prominence over another.

In *In Re Estate of Langland*, 312 P.3d 657, 177 Wn.App. 314 (Wash.App.Div 1, 2013), the Washington Court of Appeals confirmed that the application of the principals of property division in the case of a meretricious relationship is appropriate when one party survives the other. The court however refused to apply the Washington intestacy laws to the surviving partner. The court, adhering to the rule stated by the Washington Supreme Court in *Peffley-Warner v. Bowen*, 113 wn2D 243, 253, 778 p.2D 1022 (1989), confirmed that the inheritance of the survivor in an unmarried, cohabitating relationship, is not based on laws of inheritance but based on concepts of equity, contract or trusts.

(b) **Tracing the Source of Funds**: Property acquired with contributions from both partners is held as tenants in common and presumed to be owned by each in proportion to the contribution made by each.

(c) **Trust Fund Theories**.

(1) **Resulting Trust**: Property taken in the name of one person by another person who has provided consideration for such property has equitable interest in such property absent any other evidence of intent.

(2) **Constructive Trust**: Property obtained by one who obtained or retained such property by unjust means may be deemed, by court order, to be holding the property for another.

(d) **Contract Theory**: Contract must be shown to have existed between the parties (offer, acceptance and consideration).

(e) **Implied Partnership/joint venture.** The existence of a partnership/joint venture may be based on an implied contract which can be assumed to exist based on the facts and circumstances of the situation. Similar to the principal of Meretricious Relationship, no one fact or circumstance will be taken as conclusive.

(e) **Tortious Interference with Gift or Inheritance**. A tort recognized in several jurisdictions which holds that "one who by fraud, duress or other tortious means, intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift". Not recognized or rejected in Washington State at this point.

B. **Legally Separated/Divorced.** This topic was covered in detail at November SEPC meeting but some points for reference are as follows:

1. **Effect of Divorce on Will.** RCW 11.12. 051 (1) provides, in part, that, if, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Note: the filing for a divorce of legal separation has no effect on one's Will – it may be prudent to do an update of one's Will prior to the entry of Dissolution.

2. **Effect of Divorce on POD Assets.** RCW 11.07.010(2)(a) provides, in part, if a marriage or state registered domestic partnership is dissolved or invalidated, or a state registered domestic partnership terminated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse or state registered domestic partner, is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected

passes, as if the former spouse or former state registered domestic partner, failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity or termination of state registered domestic partnership. Note however, it is clear this "automatic revocation" provision can not affect a former spouse's right under an ERISA Plan. To divide a retirement plan governed by ERISA, a QDRO must exist which establishes rights to an "alternate payee" (typically non-participant spouse).

The statute does provide for certain exceptions to this general rule (for example, the court can direct payment to former spouse where decedent spouse was required to hold a nonprobate asset for his/her benefit and no such asset existed at decedent's death) and the same statute directs that a third party payor will not have liability for paying a former spouse in certain instances.

3. Child Custody – Unmarried Persons. The United States Supreme Court has found that parenting is a fundamental right protected under the 14th Amendment. In Washington, RCW 26.16.126 states that parental rights and responsibilities of parents is equal in the absence of misconduct by one parent. It further states "in the case of one parent's death, the other parent shall come into full and complete control of the children and their estate". Notwithstanding the plain language of this statute, it is crucial for a single parent with sole or primary custody of a child, to update his/her Will and Durable Power of Attorney to clearly reflect his/her preference in the event a guardian is needed for his/her minor child (the estate and or person of a minor child). RCW 26.10 sets forth the law for nonparental custodial procedures and laws. In matters of custody, Washington law directs that custody of a child should be based on the "best interest of the child" (RCW 26.10.100) and it is possible that certain facts and circumstances exist which indicate a third party may be better suited to become the child's custodial guardian; an appointment of a designated guardian would be a favorable factor if a third party were to institute an action for custody.

C. Sixty-Five Plus ("Elderly Clients"). The population pool of America is getting older and living longer. There are matters that arise in the planning context that are based squarely on one's age.

1. Estate Planning:

(a) Competency. From an Estate Planners perspective, the level of competency one must have to execute documents is relatively low. Generally there is a

presumption of Testamentary Capacity which can only be overcome by clear, convincing and cognitive evidence to the contrary. One must show the Testator did not know the nature of his property or the nature of his bounty (his familial relationships).

(b) Power of Attorney.

(1) A Power of Attorney is typically preferred over a Guardianship. The State of Washington, like all states, allows an individual to designate the person or persons of his/her choice to make decisions on his/her behalf upon incapacity (or upon some other defined event). RCW 11.94 sets forth the statutory structure for Power of Attorney forms. A power of attorney is a legal document created by one person, known as the principal, to give another person, known as the agent or attorney-in fact, the legal power to act on behalf of the principal. The document can grant either general powers or limited powers to act in specific circumstances or over specific types of decisions. Certain powers must be specifically delineated to grant that power to the attorney-in-fact.

(2) A Power of Attorney can encompass both medical and financial matters but for practical purposes you should consider utilizing two separate Power of Attorney forms. The use of separate forms will likely better meet a client's needs (it isn't unusual for one person to be a better selection for financial matters and another to be a better selection for health care matters). Additionally, there may be a reason an individual would prefer different effectiveness provisions for finances versus health care matters.

(3) Institutions often will require their form be used and, in the real world, the author has found that there are times where it is better to acquiesce and draft accordingly rather then petition the court for an order compelling a third party recognize the power of attorney.

(4) If a third party is hesitant to act under the direction of an attorney-in-fact, the attorney-in-fact may present an affidavit under RCW 11.94.040 which creates a rebuttable presumption the third party's reliance on the power of attorney is deemed to be without negligence and in good faith in reasonable reliance. Under Washington law, any person acting without negligence and in

good faith in reasonable reliance on a power of attorney shall not incur any liability.

(5) Most, if not all Power of Attorney forms should be durable.

(6) A Power of attorney should state who the Principal elects as his/her guardian in the event guardianship proceedings should be instituted.)

Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification

(c) **Guardianship**. A guardianship is typically necessitated by a person's diminished mental capacity. Mental capacity may be diminished due to developmental delay, mental illness, addiction, injury, or aging. Guardianships are often times the result of a family member requesting court action but an action may be filed by any person. A guardianship may be full or partial. A partial guardianship is also known as a limited guardianship. Traditionally an attorney well versed in elder care should be consulted for guardianship matters.

(d) **Ethical Considerations**. When advising the elderly, ethical considerations are compounded as often times the "client" defers to his/her child for direction and advice. This is especially true where there has been one dominant person in a relationship who passes first. Additionally, the elderly may be hesitant to admit he/she does not understand (or has not heard) the subjects at hand and may acquiesce to decisions without understanding the importance of them. As professional advisors it is our duty to take the time to communicate with our elderly clients the effects of changes in their plans.

2. **Financial Planning Considerations**. The longer one waits to establish a plan, the more difficulty they are likely to face in accomplishing the plan. Financial planning for the elderly really begins before the point they become "elderly". Encourage your clients today to plan for this portion of their life.

(a) **Medicare**. Generally speaking, age, coupled with a history of paying into Medicare/Social Security, is the triggering factor for Medicare eligibility. Medicare does not pay for all health care costs and as such, a comprehensive financial plan should include a review of the pros and cons of obtaining "gap" coverage.

(b) **Social Security.** According to the SSA Fact Sheet found on their web-page, Social Security benefits represent about 39% of the income of the elderly. 74% of unmarried persons receive 50% or more of their income from Social Security. More frightening is the statistic posted for 2015 stating 47% of unmarried persons rely on Social Security for 90% or more of their benefits. There was no COLA adjustment made in 2015. As planners for the 99% we need to be keenly aware of optimizing social security payments for our clients and ensuring that they are aware of other benefits available. See No. 3 below.

(c) **Duty to Support a Parent.** Multiple states have some sort of law on the books which places an affirmative duty on a child to support his/her indigent parent. While Washington and Idaho do not, Oregon's law simply reads, "Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances".

In 2012, a PA Superior court upheld a ruling which allowed a nursing home to obtain a judgement against the son of a resident who incurred over $90,000 in nursing home fees and fled the country before paying. *Health Care & Retirement Corporation vs. Pittas).*

Many states with parent support laws have both civil and criminal statutes. The few statutes review also provide that a child who does not have the financial means to support a parent has the obligation to do so and provide further exceptions where there has been parental abandonment for a defined period of time.

With the increase cost of medical care for the elderly this area of law has the potential for expansion and greater enforcement.

3. **State Web Page providing Elder Care Resource**. The following web page is an initial starting point to learn of various programs offered in Washington State for the elderly: http://access.wa.gov/topics/publichealth/agingeldercare. At this site you will find the following links:

Aging and Elder Care

Adult / Senior Services and Information

Adult Abuse and Prevention

Applying for Medicaid

Assisted Living Options

Caregiver Resources

Certified Professional Guardian Program

Compare Nursing Home Quality Measures

Residential Care Services

D. **Eighteen Plus**. The state of Washington has declared that, except as otherwise provided by law, an individual is deemed and taken to be of full age for all purposes at the age of eighteen years".

1. **School Records.** The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. The law provides the parents of minor children with specified rights but these rights transfer to a child at age eighteen. If this is of concern to you, you should have your child sign an appropriate release at his institution of higher learning.

2. **Medical Information.** Pursuant to HIPAA privacy rules, adolescents who legally are adults (aged 18 or older) and emancipated minors can exercise the rights of individuals; specific provisions address the protected health information of adolescents who are younger than 18 and not emancipated. Any person eighteen or older can open a checking, savings or other investment account. Based on the foregoing, at a minimum every young adult should have in place a durable power of attorney for health care matters and for financial matters.

RCW 70.02.050(1)(c) provides (c) that health information may be released "to any person if the health care provider or health care facility reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the patient or any other individual, however there is no obligation under this chapter on the part of the provider or facility to so disclose". Since HIPPA has no corresponding exception, it is unlikely this is good law and should not be relied upon by parents for the "adult" children.

3. Financial Information. In addition to the Health Care Power of Attorney, one should consider having their adult child sign a Financial (or General) Durable Power of Attorney. If the facts do not warrant this document at least ensure your child has indicated a POD recipient on his/her financial accounts.

E. Other Items Related to Planning for Unmarried Persons.

1. Selecting a Fiduciary.

(a) Just for Fun.

THE EXECUTOR, by Edger A. Guest

I had a friend who died and he
On earth so loved and trusted me,
That ere he quit this earthly shore,
He made me his executor.
He tasked me through my natural life,
To guard the interests of his wife,
To see that everything was done,
Both for his daughter and his son.
I have his money to invest,
And though I try my level best,
To do that wisely, I'm advised,
My judgment oft is criticized.
His widow once so calm and meek,
Comes, hot with rage, three times a week,
And rails at me, because I must,
To keep my oath appear unjust.
His children hate the sight of me,
Although their friend I've tried to be,
And every relative declares,
I interfere with his affairs.
Now when I die I'll never ask,
A friend to carry such a task,
I'll spare him all such anguish sore,

And leave a hired executor.

Edgar A. Guest, Today and Tomorrow (Chicago: Reilly & Lee Company, 1942).

(b) Friend, Family or Professional. Unmarried persons often have close relationships with their siblings, other family (such as adult children, cousins, etc.), friends, and advisors and may be tempted to name one of these friends as a fiduciary of their overall estate plan.

There appears to be a rise in claims and assertions against fiduciaries; good faith attempt is not a defense. Remember, if the circumstances justify a professional trustee, the pros and cons should be discussed. What are the appropriate circumstances? There are no defining conclusions but I believe it would be similar to the famous quote by Justice Potter Stewart – [you'll] know it when I see it.

2. Insurance Planning Needs:

(a) Disability Insurance. Disability Insurance plays a role for both unmarried and married persons a like. In the case of unmarried persons however the need may be greater as there may not be a second "spouse-like" person to help cover the gap of missing income in the event of a disability.

(b) Life Insurance. Likewise, life insurance also plays a role in the overall estate plan for both married and unmarried persons. Unmarried persons should consider life insurance for at least two reasons and perhaps a third:

(1) Final Burial Costs. An amount of insurance should be held by everyone to leave a source of funds for final arrangements. Beneficiary selections should be carefully considered.

(2) Change in Circumstance. While one may never plan to marry or have kids life has a way of changing one's plans. It's like the State Farm "I'm Never" commercial. Buying insurance early on will ensure at least minimum coverage that could prove to be invaluable later in life.

(3) Potential "Savings" Account. There is a trend in considering cash value life insurance to supplement retirement plans and/or as a source of funds for early retirement. The benefits that I have heard include, no limit on

"contributions" (as opposed to retirement plans), no "early withdrawal penalty" and "income free use of your basis through loans against the policy".

(c) Long-Term Care Insurance. While unmarried people are not solitary, they may have less support when it comes to care that may be needed in their lives over an extended period of time. Planning in advance for one's long-term care should consider the purchase of long-term care insurance.

Due to extended life periods more and more individuals are requiring some form of Long Term Care. One statistic states that 70% of persons who reach sixty-five (65) will require the services of a long-term care provider. The cost for long-term care are continuously increasing making. A Genworth report published in 2013 found that the cost of nursing home care has increased more than 4 percent a year over the last decade to a median annual cost of $83,950 from $65,200 annually.

3. 2016 Tax Information. (a) – Tax Table

Taxable Income – Single Taxpayer	**Tax Rate**
$0-$9,275	10%
$9,276-$37,650	15%
$37,651-$91,150	25%
$91,151-$190,150	28%
$190,1551-$413,350	33%
$413,351-$415,050	35%
$415,051+	39.6%
Married filing jointly -$466,951	**39.6%**

(b) Standard Deduction. Single $6,300 (same as 2015).

(c) Personal Exemption Amount and Phase out.

(1) Personal Exemption. For single taxpayers, $4,050.00 (up from $4,000.00 in 2015).

(2) Phase out. The personal exemption phase out begins for single taxpayers whose adjusted gross income is in excess of $259,400 (fully phased out at $381,900.00). Both these figures are slight more then the 2015 amounts of $258,250 and $309,900 respectively.

(d) IRA, 401(k) and SEP IRA Contribution Limits.

(1) **IRA Contribution.** The contribution limits to ROTH and Traditional IRAs remains unchanged from 2015 and is $5,500.00, with an additional contribution amount of up to $1,000 for people over 50.

(2) **401(k) Contribution.** The contribution for 401(k) plans also remains unchanged from 2015 and is $18,000 with an additional contribution amount of up to $18,000 for people over 50.

(3) **SEP IRS Contribution Limit.** The contribution amount remains unchanged at $53,000.

(e) **Gift/Estate Tax Exemption.** For Federal Estate Tax purposes, unmarried persons have one exemption (in 2016 that exemption amount is $5,450,000 – hardly a number the 99% has to worry about but it could always change). A surviving spouse has the option to elect to file the proper return and claim the deceased's spouse unused exemption.

F. **Planned Giving.** I could find no statistics on who gives more to charity, the married or the unmarried but one should always inquire about a client's charitable inclination in planning. It seems logical that an unmarried (traditional single/no kids) may have greater opportunity to share with the community at large then their counterparts (married or unmarried with children) in similar economic situations.

G. **Advanced Burial/Memorial Arrangements.** Unmarried people may wish to plan and pay for their final arrangements in advance. This is a gift to those left behind whose grief, proximity, or other factors make such planning difficult.

G. **Conclusion.** Somethings may be easier for the unmarried but estate planning isn't necessarily one of them. You will inevitably hear the unmarried person in the 99% saying "I have nothing"; in my world this translates to "then you need a plan more then anyone".