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# Unmarried Couples Face Retirement and Estate Planning Challenges



By Joseph Hahn, Wealth Advisor at  
J.P. Morgan Wealth Management

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- The number of unmarried cohabitating partners continues to rapidly increase in the United States.
- The laws and financial system of the United States are fundamentally oriented towards legal marriage; unmarried couples must take extra care to protect themselves.
- For some important planning items, there is no viable substitute for legal marriage's ability to confer significant financial benefit on the surviving spouse.

The rapid evolution of relationships, living arrangements and family life continues in the United States and appears to be accelerating.<sup>1</sup> Americans' marital and living arrangements have changed dramatically over the past 30 years. The share of adults aged 25 to 54 who are currently married fell from 67% in 1990 to 53% in 2019, while the share who are living together outside of marriage more than doubled over that same period from 4% in 1990 to 9% in 2019.<sup>2</sup> In 2019, the US Census estimated over 17 million unmarried partners living together in the United States.<sup>3</sup>



<sup>1</sup> <https://www.pewresearch.org/social-trends/2021/10/05/rising-share-of-u-s-adults-are-living-without-a-spouse-or-partner/>

<sup>2</sup> <https://www.pewresearch.org/social-trends/2021/10/05/rising-share-of-u-s-adults-are-living-without-a-spouse-or-partner/>

<sup>3</sup> [https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html#:~:text=The number of unmarried partners, total adult population \(xls\).](https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html#:~:text=The number of unmarried partners, total adult population (xls).)



Cohabitation has increased in large measure because, while people are delaying marriage to ever greater ages, they are not delaying sex, living together, or childbearing.<sup>4</sup> The reasons for these societal changes are complex. For example:

- Young adults have come to view marriage as a capstone event: couples used to marry and then build a life together; more and more today, they build the life together first.<sup>5</sup>
- Younger couples today appear to be much more urgently motivated by steady employment and financial independence than in the formal institution of marriage.
- Social norms have evolved significantly — the social stigma of living together outside of marriage or of having children outside of marriage has dramatically changed compared to prior decades.<sup>6</sup>
- When one takes into account the increased empowerment of women to work outside the home and the relative availability of birth control and family planning services compared to decades ago, it is not surprising that many couples feel no rush to get married early in life, if at all.<sup>7</sup>

The decision to get married or to move in with a partner is deeply personal, but for most, love and companionship trump other considerations, such as a desire to have children someday, convenience, or financial advantages.<sup>8</sup> Most Americans are now of the view that living together before marriage may help prevent divorce.<sup>9</sup> Approximately 40% of current unmarried yet cohabiting partners may be hoping to get married someday, while 25% have no intention to ever get married and 35% are unsure.<sup>10</sup> Regardless of one's personal intentions, it is critical that unmarried partners understand the legal and financial implications of remaining unmarried and take steps to minimize foreseeable risks associated with cohabitation outside of marriage.



<sup>4</sup> <https://ifstudies.org/blog/cohabitation-is-pervasive#:~:text=Cohabitation has greatly increased in,, living together, or childbearing.>

<sup>5</sup> <https://thehill.com/homenews/state-watch/4032467-americans-are-waiting-longer-and-longer-to-get-married/#:~:text=Americans aren't marrying young, two-thirds to 22 percent.>

<sup>6</sup> <https://thehill.com/homenews/state-watch/4032467-americans-are-waiting-longer-and-longer-to-get-married/#>

<sup>7</sup> <https://thehill.com/homenews/state-watch/4032467-americans-are-waiting-longer-and-longer-to-get-married/#>

<sup>8</sup> <https://www.pewresearch.org/social-trends/2019/11/06/why-people-get-married-or-move-in-with-a-partner/#:~:text=The decision to get married, children someday, convenience or finances.>

<sup>9</sup> <https://ifstudies.org/blog/cohabitation-is-pervasive#:~:text=Cohabitation has greatly increased in,, living together, or childbearing.>

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# Outside legal marriage, there are significant retirement and estate planning challenges for couples to consider.

Unlike married couples, when one unmarried partner dies, the survivor does not receive any automatic legal right to their deceased partner's assets. Indeed, within the context of a legal marriage, there are numerous default legal protections that many couples simply take for granted. Without such default laws in place, unmarried partners must engage in formal estate planning to avoid serious unintended consequences in the event of incapacity or death. Potential solutions to some of the most common challenges include:

***Without express appointments in your estate planning documents, your unmarried partner will not be your executor, conservator or your beneficiary.***

- In most states, one's married spouse has default rights to serve as conservator in the event of incapacity, as executor of the estate in the event of death, and at least as a partial beneficiary of the deceased's assets.
- In the absence of such default protections, the surviving partner could have their entire life impacted in extremely negative ways (for example, relatives of the deceased partner could take control of the process and assert their rights to possession of real property and distribution of all assets).

- To avoid such problems, unmarried partners should seriously consider consulting with an attorney to put legal appointments in place, such as naming each other in wills, trusts and powers of attorney, in addition to titling assets in joint name with rights of survivorship in those states where that asset titling is available.





***Unmarried couples owning real property together should take additional action to protect their respective interests***

- Best practices include “property co-ownership agreements” that document an agreement between the parties on subjects such as:
  - » who contributed how much to the down payment, to mortgage payments and to ongoing maintenance and improvements;
  - » how to allocate income tax deductions such as mortgage interest;
  - » setting a minimum holding periods for the property (typically 2 years minimum to permit maximum capital gains exclusion);
  - » procedures for buying out a partner who wishes to sell and on what terms such as assumption of loans and appraisal procedures.
- Agreeing in writing, in advance, on all of these topics sets the “rules of the road” and minimizes the risk of costly and time-consuming litigation in the future.



***Breaking up is always hard to do. But the common view is that it is easier for an unmarried couple to end their relationship — indeed, this “easy out” motivation likely keeps many couples from marrying in the first place.***

- While divorce is always difficult and frequently hard-fought and expensive, there are well-established laws in each state that govern the process of legally ending a marriage, including division of assets and providing for the ongoing care and support of children.
- When an unmarried couple ends their relationship, there is no single set of laws upon which the couple could rely to assist in the process. In the absence of mutual agreement, the couple has no recourse but to sue each other in civil court under a variety of legal theories, none of which are fast or inexpensive, even when compared to divorce.
  - » For example, if assets are commingled, or both partners want the family home, or if custody or support of children is disputed, the process of ending the relationship will become at least as difficult if not more so than a formal divorce

## RECOMMENDATION

Unmarried couples should strongly consider working with an attorney to establish a “cohabitation agreement” (in lieu of a prenuptial agreement), again to set “rules of the road” agreed to at the inception of the relationship contemplating a specific set of processes for the orderly untangling of the couple’s lives and finances in the event the relationship does not last permanently. These couples should also consider “alternative dispute resolution” procedures such as mediation or binding arbitration that could permit faster, less expensive resolution of disputes short of court-based litigation.





*In addition to the financial benefits of marriage, spouses are often given the benefit of the doubt if decisions need to be made about health care or end-of-life choices*

- Many doctors and hospitals will take instruction from a spouse even in the absence of a formal health care power of attorney
- The same is **not** true for non-spouses—health care professionals will almost always require a document to allow unrelated individuals to make health care decisions for someone
- Without a formal health care proxy or health care power of attorney, health care providers may rely on the next of kin to make those decisions

#### RECOMMENDATION

Unmarried couples who want to be able to make health care decisions for each other should strongly consider working with an attorney to establish health care powers of attorney naming each other as the decisionmaker. The health care power of attorney could include language allowing the partner to receive health information (HIPAA waiver), and the couple should also speak with their attorney about signing living wills or advance directives describing for the health care proxy their wishes for end-of-life care.



# Regardless of planning, some rights and benefits of marriage simply cannot be replicated through planning.

- Unlike married couples, Social Security spousal and/or survivors benefits are not available to unmarried partners. This difference alone can amount to hundreds of thousands of dollars in lost benefits to the unmarried partner of a deceased person who was eligible for benefits.
- Marriage creates valuable income tax benefits when inheriting tax-deferred retirement assets. Unlike married couples, an unmarried partner inheriting the retirement assets of her partner cannot benefit from the preferential tax deferral a surviving spouse enjoys. An unmarried partner may only transfer the assets to an inherited IRA, must take required minimum distributions each year and, most critically, must have all inherited assets distributed out of the tax-deferred account by the end of the 10th year following the death of the account owner. A surviving spouse is not subject to this 10 year rule and may roll over the inherited assets into a new or existing IRA in the surviving spouse's own name (and thus delay taking RMDs until the surviving spouse reaches age 73, or age 75 after 202[7]) or can elect to transfer the assets to an inherited IRA.<sup>11</sup>
- Unmarried partners may face significant surprise estate or gift tax liability after the death of their wealthy partner
  - » Married spouses enjoy an unlimited marital deduction for gift and estate tax purposes, i.e., the spouses can transfer to each other unlimited amounts of money during life or at death while incurring no gift or estate tax.
  - » Unmarried wealthy partners often find themselves shocked at the impact not being married can have on estate taxes. Any assets of the deceased partner in excess of the estate tax exemption (\$12.92 million per person in 2023) would be taxed at 40%.
  - » And for unmarried couples with a considerable age difference (whose ages are more than 37.5 years apart), the assets of the deceased partner in excess of the Generation Skipping Tax exemption (also \$12.92 million in 2023) would be subject to an additional 40% tax in addition to any estate tax due.
- No clever estate planning can re-create the unique benefits of the unlimited marital deduction.

<sup>11</sup> <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-beneficiary>.

# Common law marriage is relatively uncommon and should not be relied upon.

Many partners who are not legally married frequently operate under the misconception that they are considered spouses under “common law.” The frequently repeated myth is that after seven years of cohabitation, a couple is legally married. In reality, only a few jurisdictions recognize the concept of a common law marriage<sup>12</sup> and none have

a specific time frame for the marriage to be considered legal.<sup>13</sup> To minimize the risk of serious problems, couples who desire to avail themselves of the rights and benefits of legal marriage should get formally married and not rely upon common law theories.



<sup>12</sup> <https://www.investopedia.com/financial-edge/0210/marriage-vs.-common-law-what-it-means-financially.aspx#>. Although many people believe seven, using the same last name.

<sup>13</sup> Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah and the District of Columbia.



## Why This Matters:

With the trend towards unmarried partners only accelerating, it becomes more and more important for persons in such relationships to examine their own personal financial and life circumstances and consult with their estate planning attorney and trusted advisors to take action to minimize risks from not being legally married.

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