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**FAMILY LAW ISSUES FOR**  
**THE MODERN FAMILY**

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## FOREWORD

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The Institute is especially grateful to our outstanding Seminar Chairperson(s) for providing the necessary leadership, organization, and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty, without whose untiring dedication and efforts this seminar would not have been possible. Their names are listed on the brochure for this program and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2017

*Tangela S. King*  
Interim Director, ICLE



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**THE BENEFITS OF USING ADR TO RESOLVE DISPUTES INVOLVING LGBT PARTIES**

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**CONFIRMING PARENTAL RIGHTS FOR LGBT FAMILY BUILDING**

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# Love, Death and Taxes: A Survey of Issues Faced by Couples and Ex-Couples

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LOVE, DEATH AND TAXES: A SURVEY OF ISSUES FACED  
BY COUPLES AND EX-COUPLES

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Disclaimer: This outline is intended for use by the generalist or non-tax bar. These materials should assist you in being knowledgeable about the present state of taxation, mostly income taxation, estate planning and how it impacts your clients. Nothing herein can take the place of a careful assessment of an individual's specific facts by a tax professional before implementing any tax planning or taking any filing position.



LOVE, DEATH AND TAXES: A SURVEY OF ISSUES FACED BY COUPLES AND EX-COUPLES

by

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INTRODUCTION

*“I wouldn't mind paying taxes if I knew they were going to a friendly country.”*

*- Dick Gregory*

As we feel the chill winds of a Thermidorean Reaction in our Republic after the election of you-know-who, we should take the time to reassess where we are. Marriage equality is still the law of the land. Equal Protection still has teeth. We may have to refight some of the same battles over again, but in all honesty, when compared with where we were even just 10 years ago, we've come far. Fear not.

A person who is single as opposed to being part of a committed couple, and who happens to be LGBT has, for the most part, the same problems as straight single individuals with respect to property, taxes and what happens when they die. However, when a person commits themselves to another, whether married or not, they enter into a new legal environment. Most of these issues are truly inclusive: they occur regardless of whether it is a same sex couple or not. This presentation is a survey of salient legal and tax issues that are confronted when a couple is formed, when a couple is married, and when a couple ceases being a couple. This is a survey and is meant to assist the generalist in issue identification.

## PART ONE - THE UNMARRIED COUPLE

*“The purpose of a written contract is to keep two honest people from getting confused.”*

*- Anon*

Since the concept of a married same sex couple on a nationwide basis is only a few years old, this section dealing with unmarried couples is perhaps an uncomfortable flashback of the way it was for all same sex couples. On the other hand, not everyone feels compelled to marry. We will always have couples co-habiting without a marriage.

A. Legal Issues of Unmarried Couples. The primary principal of a couple that informally commits to each other, and perhaps co-habitates, is that they are legal strangers to each other. They have no legal claims on each solely because of their status as a couple. Sharing property or sharing the costs of running a household, however, creates a host of legal and equitable issues.

1. The Domestic Partnership Agreement. If there is no marriage the couple should memorialize their mutual agreement on the sharing of costs or ownership of property with a contract, often call a Domestic Partnership Agreement. Like any other contract it is based on consideration and should contemplate in broad, and sometimes detailed terms who is paying for what, how it is being paid, and what happens to the ownership of property collectively acquired. While closely resembling a Pre-Nuptial agreement, it does not necessarily contemplate marriage.

2. Powers of Attorney. An unmarried couple has an even greater need to consider executing powers of attorney authorizing the one to act for the other. The Georgia Financial Power of Attorney fills the role of what used to be called a Durable Power of Attorney and can be found at O.C.G.A. § 10-6-140. While you can create powers of attorney that are different from the statutory format, using it does have the advantage of ease of recognition when you present this document to financial institutions. The sections in the statutory draft dealing with health care and taxes are considered by some to be too abbreviated. The effective date of the document and the conditions under which the power of attorney springs into force may be customized to the client's needs.

3. Georgia Advance Directive for Healthcare. This document with the ponderous name takes the place of our old Living Wills and Georgia Durable Power of Attorney for Healthcare. It authorizes a specific person to carry out the wishes of the maker if they are unable to do so in electing, or not electing medical care. During the Obama administration, an executive order mandated that medical facilities allow each patient to specify who they wish to be able to visit in order to avoid the old bans on people not considered to be your family by the hospital. Since this was an executive order, under the current regime it would behoove unmarried couples to have a properly completed Georgia Advance Directive for Healthcare. As with the statutory financial power of attorney, use of a different document or format is permitted to carry out the maker's wishes. See generally O.C.G.A. § 31-32-1.

4. Joint Ownership of Property. Adding a person to whom you are not married to a deed for real estate you own is a serious matter and a thorough understanding of

the legal effect of co-ownership is required. Deeds to real estate that present co-owners do not create a right of survivorship unless specific wording is used to create joint ownership as opposed to a tenancy in common. Without a recitation of the right of survivorship, joint ownership of real estate on a deed merely conveys an undivided interest. At the death of the co-owner, the surviving co-owner still only has their 50 % undivided interest. To transfer the property to the survivor at the death of a co-owner the right must be specified. O.C.G.A. § 44-6-190.

In contrast, joint ownership of personal property, for example, bank accounts, including does include a right of survivorship such that the ownership of the property is vested in toto in the survivor. O.C.G.A. § 7-1-813, and for stock ownership in corporations O.C.G.A. § 14-5-8.

Aside from the legal details about creating joint ownership, there is the matter of the transfer itself. A transfer between two persons who are not married is a recognition transaction in that something happening for tax purposes. Is there a transfer for value ? If so gain or loss may be recognized. Is it a gratuitous transfer ? If so a reportable gift may have occurred.

B. Federal Tax Issues of Unmarried Couples. Unmarried couples are separate and unrelated individuals under the Internal Revenue Code unless and until they enter into a legal marriage based on the law of the state or location of the marriage. In this separateness there are opportunities, and a few pitfalls.

1. Unmarried couples may not file joint returns. Without a valid marriage, the

unmarried parties to such a couple must file as single persons, or they have a qualifying dependent, as head of household.

2. “Significant Other” as a dependent. If one of the couple provides more than half the support of the other member of the couple, and that supported person did not have income of their own above the amount of the personal exemption and the standard deduction, then the supporting member of the couple can claim the other person as a dependent. If the other person is a dependent, then the supporting person may also pay and claim a deduction for the medical bills and expenses of the supported person.

3. Employer provided health insurance that covers a domestic partner is not tax free. If the employer of one member of the couple provides benefits to employee’s domestic partners, then those benefits are taxable to the employee.

4. Transfers of property from one member of the couple to the other may have tax implications. Specifically, if one member of the couple transfers ½ interest in the couple’s home, and the couple is not married, the transfer is a transaction the tax consequences of which have to be dealt with. If the transfer is gratuitous, then it is a reportable gift. (Every person is permitted to give up to \$ 14,000 to anyone in a calendar year. Gifts in excess of the annual gift limit reduces the applicable credit available against Estate tax.) However, if there is quantifiable consideration, then a gain or loss may have occurred resulting in taxable income or a capital gain.

5. Strategic Gifting. When one member of the couple is spending money on medical or educational expenses of the other member of the couple, and the other person is NOT their dependent, then the paying member should instead make a gift over to the other so

that that person can, at least take the tax advantage of the expense.

6. Mortgage Interest Deductions. A person who makes the payments on a mortgage loan secured by their home may claim a deduction for mortgage interest paid. They are not required to be on the loan. If they have an interest in the property that is subject to the mortgage, that is enough to allow them to claim a deduction. See generally IRS Publication 936.

C. Estate Issues of Unmarried Couples. It is in estate matters that the need for some form of document or instrument creating rights for the surviving member of the couple becomes the greatest. Without fore thought and adequate planning, the survivor, even though they contributed financially to the household of the deceased member may be found without any rights whatsoever in the estate of their deceased partner.

1. Domestic Partnership Agreement should contemplate the end of the partnership by death and provide for such contingency.

2. Alternatively, where a couple has more complex property ownership a well drafted revocable trust can thoroughly deal with shared property issues. One of the big advantages of a Revocable Trust is that they are construed and interpreted as a contract and would therefore not fall into the jurisdiction of the Probate Court, nor be subject to challenge in the same way as a will. Revocable Trusts, unlike a will admitted to probate, is a private document the full text of which is not in the public record.

3. In all cases, a well drafted will, even when the couple has adopted revocable trusts, is a necessity.



## II. PART TWO - THE MARRIED COUPLE

*“Rich bachelors should be heavily taxed. It is not fair that some men should be happier than others.” - Oscar Wilde*

A. Legal Issues of Married Couples. A legally recognized marriage brings fundamental changes in the legal rights of the members of the couple.

1. Georgia is an Equitable Division State. The fact that a couple marries does not create rights of one spouse in the pre-marital property of the other. In addition, property acquired by inheritance, or with pre-marital assets are not necessarily subject to equitable division between the parties. Property acquired with marital assets, on the other hand, is subject to equitable division in the event of divorce or separation.

2. A Pre-Marital or Antenuptial Agreement can be used before the marriage to more clearly set out how the property of the couple will be divided in the event of a separation or divorce. A voluntary contract between parties to a marriage in which matters of property are set out is permitted under the Georgia Code. Such contracts and the provisions affecting them is generally set out in title 19 Article 3 of the Georgia Code.

3. Powers of Attorney and the Georgia Advance Directive for Health Care are both documents that should be adopted by married couples. Just because a couple marries does not make one spouse the attorney-in-fact of the other.

4. Georgia does not recognize tenancies by the entirety, nor dower or curtesy. While a spouse may have an equitable interest in property acquired with marital assets during the marriage, that extent of that interest is not known until the a determination is

sought.

5. A spouse is entitled to receipt support from their spouse, however a spouse does not acquire liability for the debts or acts of their spouse merely due to their marriage.

B. Federal Tax Issues of Married Couples. A couple that is married on at least the last day of the tax year is considered as married during the entire year. The fact of the marriage can effect them in many ways under the tax code.

1. Filing Status. A couple that is married as of the last day of a tax year may elect to file jointly, or separately. Those are their choices. They can't elect to file as a single person unless they are under a Court ordered decree of separation.

(a) Annual Election. The election to file jointly or separately is made every year by filing a return based on the selected status. The election effects only that year's return. Once a joint return is elected, you cannot subsequently change your mind and file a separate return. It is irrevocable for that tax year. If a party to a couple elects to file separately, they may subsequently change their mind and file an amended joint return as long as the statute of limitations has not run. (3 years from the date the return is filed). (See generally Code section 6013 et seq.)

(b) Joint and Several Liability. The most important implication of a joint return is that both members of the couple are signing that return under penalties of perjury and each is *jointly, and severally* liable for the taxes on that return, or as subsequently amended, or changed by audit and

assessment.. Generally, since a person is not responsible for the individual debts incurred by their spouse, tax debts incurred on separate returns are NOT joint and several debts. They are lodged only against the filing spouse.

The legal liability of both members of a couple arising from a joint return makes this election critical if one of the spouses engage in activities that could be considered high risk from a tax standpoint. If they have poor business records or questionable business practices, engage in an illegal business, or already have substantial tax debts, the other spouse may choose to file separately and not involve themselves in their spouse's tax difficulties.

2. The Marriage Penalty There is no marriage penalty written into the tax code.

It results from our income tax system relying on graduated rates to calculate taxes. All taxpayers start at \$ 0.00 in taxable income and work their way up through the assigned rates for various levels of income. When a couple files jointly, the income of one spouse is "stacked" on top of the other, thereby eliminating for that person the journey through the tax rates starting at \$ 0.00 in income, taxing their first \$ 1.00 of income at the highest rate of the other spouse. A marriage penalty is found when comparing the total taxes arising from a joint return to the collective result of the couples' two single returns had they not married. Because the final result of an individual's income tax situation is so very fact specific, the best way to anticipate, and plan for any marriage penalty, is for the couple to consult their tax advisor who should be able to accurately project the tax impact of

marriage.

3. Mitigation of Joint and Several Liability. There are various ways in which the impact of “joint and several” liability for joint tax assessments may be mitigated.

(a) Innocent Spouse Relief. Where a spouse has participated in a joint return that has an understatement of tax due to erroneous items of the other spouse, and the requesting taxpayer can show that at the time of signing the tax return the taxpayer did not know, or have reason to know, there was an understatement of tax, AND the requesting taxpayer can show it would be unfair to hold them responsible for the understatement, they may request the IRS hold them blameless and not liable. Code Section 6015(b)

(b) Tax Refund Offsets and Injured Spouse Relief. Internal Revenue Code Section 6015(c) allows a spouse to seek relief from liability arising from the other spouse’s *prior* tax debt. If granted by the IRS, the tax refund or liability is allocated based on the taxable income as if the couple had filed returns as married filing separate. The relief is sought via form 8379 as soon as the requesting party learns of the threatened offset to their refund.

4. Married Spouses Tax Status of Employment benefits and protection in employee benefit Plans. Health insurance provided to an employee may include their spouse tax free. In addition, a married spouse has rights in any retirement benefits provided to their spouse during their marriage under the Retirement Equity Act of 1984.

5. Transfers of property from one spouse to another is a “non-recognition”

transaction that does not create gain or loss, nor is it reportable as a taxable gift.

Internal Revenue Code section 1041 specifically makes interspousal transfers treated as a gift for income tax purposes. Additionally, interspousal transfers as a gift are not subject to gift tax being considered part of the unlimited marital deduction (IRC § 2523). (However, if your spouse is not a citizen, there is an annual limit to tax free gifts. See IRC 2523(i))

C. Estate Issues of Married Couples. Parties to a legal marriage possess some powerful rights in the event of the death of their spouse. A surviving spouse is preferred to anyone else in serving as an administrator or executor of the estate of the deceased spouse. Their needs and preferences are even considered in deference to those of surviving children.

1. Right to a Year of Support. The surviving spouse and minor children are entitled to an equitable carve out from the deceased's estate of an amount called a "year of support". This right comes before all costs and expenses of the estate and all debts of the estate excepting only a perfected security interest. This right is in addition to any provision or bequest in any last will and testament and it does not matter if the estate is testate or not. In many cases the year of support is used to completely exhaust the estate eliminating the need for an administration or probate. Indeed, in cases where a spouse has been "disinherited", if they are still married they are still legally entitled to a year of support. O.C.G.A. § 53-3-1 et seq.

As stated, a surviving spouse or minor child is entitled to receive year's support from an estate if they apply within two years of the decedent's death. Remarriage by the

surviving spouse, if occurring prior to filing a petition for a year of support will invalidate their right.

2. Rights in an Intestate Estate. Surviving spouses and children take first from an estate, sharing equally EXCEPT that the spouse's share cannot be less than one third. (O.C.G.A. § 53-2-1 (c)(1))

3. Preference in Service as Administrator. The surviving spouse is preferred over anyone else in serving as the administrator of an intestate estate. O.C.G.A. § 53-6-20.

4. Unlimited marital deduction in figuring taxable estate. The most common deduction in the calculation of taxable estate is the marital deduction which allows you to subtract from the amount of the gross estate the dollar value of all direct transfers to the surviving spouse. There is no limit to this deduction: in theory, an estate worth \$ 1 billion that passes to a surviving spouse incurs no estate tax.

5. The Applicable Credit Against U.S. Estate Tax and Portability between Spouses. The credit against Estate Tax that is available to all US residents is also transferable between the estates of married individuals. When one spouse dies, and they have not fully used their credit against taxes on their estate, the surviving spouse may receive, and their estate may benefit from, the portion not applied in the prior estate. Thanks to marriage recognition, same sex couples can now enjoy the portability of the unified credit such that over \$ 10 million in property can now pass from the estates of same sex couples to their beneficiaries unmolested by Federal estate tax.

### PART III - DIVORCED AND DIVORCING COUPLES

A. Legal Issues of Divorcing Couples. Since this topic is vast and really belongs in a presentation on Domestic Relations law, I will limit my comments to certain selected issues involving tax and financial matters.

1. Property Transfers incidental to a Divorce are “non-recognition” transactions.

That means they do not create gains or losses and the basis in the property transferred is “carried over” from one spouse to another. This means that the imposition of the property settlement should not create, by itself, any tax consequences. (N.B. See alimony and Child Support below). (IRC § 2523)

2. QDROs. The division of funds inside a retirement account as part of a property settlement in divorce is handled by a Qualified Domestic Relations Order. The intent of a QDRO is essentially to roll over all or part of funds held in a tax qualified plan to the other spouse’s retirement account. It does not prevent the imposition of income tax if, or when, those funds are withdrawn from a retirement account. (IRC § 414(p))

3. Alimony and Child Support. Alimony is generally taxable to the recipient and deductible by the payor. Not all ordered payments that are called “alimony”, however, are considered to be alimony under the Internal Revenue Code. Child Support is not taxable, nor deductible.

To be alimony, a payment must meet certain requirements. They must be payments ordered by the Court under a written separation agreement, or a decree or any type of court order requiring a spouse to make payments for the support or maintenance of the other spouse. This includes a temporary decree, an interlocutory (not final) decree, and a decree

of alimony pendente lite. The IRS goes to great length to differentiate between property settlement and child support and alimony payments. See generally IRC 71.

4. Filing Status while Divorce is Pending. The choices in filing status while a couple is still married are: married filing joint, married filing separate, and if one spouse has a qualifying dependent, head of household. A party may not file as a single person unless and until a final decree of divorce or separate maintenance has been entered. (See generally IRS Publication 501).

Couples that are avoiding agreement on the filing of a joint return due to concerns about cooperation in accessing the proceeds of a refund should involve their tax preparer who can designate that part or all of a refund is direct deposited into one *or more accounts*. This means that you don't really need both spouses to cash a refund check unless the joint return has been filed without any thought of this source of potential conflict.

5. Divorce and Prior Wills. Previously, commencing or terminating a marriage acted to invalidate any wills of the parties. However in the major overhaul of the Georgia Probate Code a few years ago by Professor Radford and her team, the provision was adopted that following a divorce, an ex-spouse is treated as having pre-deceased the testator in the event a pre-divorce will is being probated. O.C.G.A. § 53-4-49.

6. Designated Beneficiaries. Divorced parties frequently fail to change beneficiary designations and this can have disastrous consequences. Where a party has left their ex-spouse as a beneficiary of a life insurance policy, an IRA, a 401(k) account or similar instruments the ex-spouse in fact does receive the benefit of that designation and the fact of the intervening divorce does not change that.



PART IV - ETHICAL ISSUES FOR THE ATTORNEY

(A) Conflict of Interest. When an attorney is asked by a couple to assist them with compiling an estate plan and to craft the necessary documents to carry out the plan, the potential for a conflict of interest exists according to the Canon of Ethics of the State Bar. The attorney should disclose the potential for a conflict of interest with the clients and the best practice is to obtain a signed waiver. Rule 1.7, footnote 13.

(B) Attorney as Executor or Trustee. Sometimes a client may wish to name their attorney as the executor or trustee of the documents that same lawyer is drafting. The Supreme Court requires that the attorney who is both the nominated fiduciary and the drafter of the document obtain a signed written statement of the client in a suggested form. See Formal Advisory Opinion No. 91-1.

