

**Married vs. Partnered (Unmarried) Couples  
Key Differences Under Federal Law and New York State Law**

Marriage, a civil status, confers rights and obligations. Federal law (DOMA, the Defense of Marriage Act) defines marriage as being between a man and a woman. Even if state law authorizes same sex marriage (and New York law does not), the federal prohibition trumps virtually everything.

*Strategic charitable giving, as part of effective estate planning, can mitigate, but not eliminate, this disadvantage.*

**COMPARISON OF RIGHTS:  
MARRIED AND PARTNERED COUPLES IN NEW YORK STATE**

<b>Issue</b>	<b>Married</b>	<b>Partnered</b>	<b>Possible Solutions</b>
Estate Taxes	Federal estate tax on assets over \$5M for two years.	Same.	Use charitable split gifts like charitable lead & remainder trusts, gift annuities, life estates to shift wealth to partner and reduce estate tax bite at death of first partner. Use by-pass trusts to reduce estate tax upon death of second partner.
Marital Deduction	NY estate tax on assets over \$1M.  100% marital deduction NY & federal. Means no tax @ first death.	Same.  No marital deduction for partner.	
Value of joint property	Assumed 50/50 between spouses	All assumed in estate of decedent absent proof.	Keep perfect records.
Special use valuations to reduce estate size.	Available to spouse and “family” only.	Not available.	Active succession planning; insurance trusts. Use charitable trusts to reduce tax bite.
Generation skipping transfer tax	\$5M exemption.	GST problems if assets pass to person not a biological or adopted child and more than 37.5 years younger.	Consider making gifts now and charitable “split gifts” later if lower GST rates come back.
Income tax	Joint return allowed.	No joint return.	No cure. Use deductions carefully.

Federal \$5M lifetime gift tax exemption, plus annual exclusion gifts under §2503. (NY has no gift tax).  Consent gifts.	Unlimited gifts for US citizen spouse, and generous annual exemptions for gifts to alien spouses.  Spouse can “consent” to annual gift by spouse to double annual giving.	No exemptions for gifts to partners.  No consent gifts.	Use charitable split gifts to decrease tax value of gifts in order to increase amount passing to partner and others.
Laws of Decent & Distribution. EPTL §4 (if there is no will) & SCPA Art.10	Spouse has rights to property if no will; share with issue if any. Spouse has preference to act as administrator	Partner is legal “stranger” with no right to inherit.	Do estate planning to create rights.
Family Rights. EPTL §5	Right of Election protects spouse. Some assets reserved for spouse & issue.	Partner is legal “stranger” with no protected rights.	Unless law changed, rely on estate planning and contractual domestic partnership agreements.
Probate Proceedings SCPA Article 14.	Spouse & other legal distributees must get notice.	In <u>Ranftle v. Leidy</u> , spousal relationship created by Canadian marriage recognized for notice purposes. Partnership alone not enough.	Plan your estate! Use a revocable living trust (and fund it!) to avoid probate and intestacy. Observe formalities carefully.
Settlement of Small Estates SCPA Article 13.	Spouse has priority if no will; named executor has priority if there is a will.	“Partner” is not on the list; arguable protection if married out of state.	Make a will or trust that owns everything.
Right to inherit if relationship ends EPTL §5-1.4	Rights end with divorce; bequests & fiduciary nominations canceled.	No automatic cancellation of bequests or fiduciary nominations.	Revise documents promptly after break up! (Everyone must review beneficiary designations).
Right of children to inherit from parent or vice versa.	Yes; paternity assumed if child born in wedlock or adopted.	No parental rights for non-biological parent or child.	Do “second parent” adoption. Prepare will & trust.
Wrongful death SCPA §1421	Spousal rights for consortium, support.	Limited rights.	None.
Health care decisions	Right to be present & make decisions usually clear.	No inherent rights; obstacles common; new law for greater access unclear.	Do health care proxy & HIPAA designation.

Decisions re: burial/cremation	Spouse has preference to decide.	Partner may have preference <u>if</u> Domestic Partnership registered and proved.	Prepare affidavit stating choices. Preplan funeral. Register Domestic Partnership.
Medical insurance	Yes.	No right.	Depends on employer; purchase for partner under 2503.
Guardianship of minor children	Automatic preference.	No preference.	Adopt! Name guardian.
Adoption	Status positive fact.	Costly.	Build case & hope. Objection of biological parent may interfere.
Medical decisions re: children	Automatic	No automatic right for second parent/partner.	Adopt! Prepare written instructions.
ERISA	Protection for spouse.	No protection for partner.	Use charitable trust as plan beneficiary.
IRA withdrawal	Roll over rights for surviving spouse.	No roll over rights.	Use charitable trust as plan beneficiary.
Annuity withdrawals	Joint & survivor life income possible.	No right to life income for partner.	Check contract before buying.
Property rights on dissolution of relationship	Prenuptial agreements usually enforced if fair. No income or gift tax consequences to property settlement.	No specific law to enforce domestic partnership agreements. Can be adverse tax consequences on property settlement.	Make a contract and hope for the best. Plan for tax consequences as well as possible.
Tenancy by entirety	Property ownership for spouses; some asset protection.	Not available, but less exposure on debts of partner.	None. Use other asset protection techniques.
Privileged communications	Spousal privilege.	No spousal privilege.	None.
Immigration	Spousal preference.	Negative implications	None
Right to take over coop or lease.	Common for spouse & children	Not certain for partner or non-biological children	In hands of coop or landlord. Use TOD for shares.
Veteran's & military benefits	Some survivor benefit for spouses.	No survivor benefits.	None.
Social Security	Survivor benefits.	No survivor benefits.	None. Consider gifts (especially charitable split gifts) to make up deficit in retirement planning.