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Estate Planning - Focus on Same Sex Couples

By Loraine M. DiSalvo

I. Everyone Needs Estate Planning; However, It Is More Critical For Some People.

A. Estate Planning is Not Just for the Wealthy. You do not need to be wealthy or to have an estate tax problem in order to need an estate plan. If you own anything at all, you pretty much have an estate, which will need to be dealt with in the event of your death. Also, "estate planning" also deals with issues which may arise during your life, such as temporary or permanent mental incapacity, so even if you plan to live forever you will still need at least some estate planning to make sure you and your loved ones are protected.

B. "Estate Planning" Deals With Issues Which Arise During Your Life and At Your Death. An "estate plan" deals with what will happen both during your lifetime and after your death in various situations. A properly prepared, comprehensive estate plan will appoint one or more persons to act on your behalf, if and when you can no longer handle your own affairs. A properly prepared estate plan will also provide directions as to what should happen with regard to you and your property in various situations. For example, an estate plan should cover issues such as the following:

1. **Paying bills, dealing with finances and property, and dealing with other non-health care related issues**. A properly prepared estate plan includes a document, usually called a power of attorney, which appoints someone to be able to deal with day-to-day, non-health care related issues if you are unable to do so for yourself. The inability to act for yourself would include a situation where you are disabled for an extended period due to illness or injury; but this inability can also exist in other situations, such as if you take a long vacation.

2. **Dealing with doctors and health insurance companies on your behalf, which can include consenting to medical treatment, obtaining information regarding your health, and determining who can visit you in the hospital or a nursing home.** A properly prepared estate plan should also include an Advance Directive for Health Care, which is a document which appoints someone to be able to make health care-related decisions on your behalf during any period in which you are unable to do so yourself, and to receive health care-related information about you.

3. **Appointing a guardian to take care of any minor children you may have in the event of your death.** A properly prepared estate plan, if you have any minor children, should address the appointment of guardian to take care of the children if needed..

4. **Determining who will pay your bills, distribute your property, and otherwise settle your affairs in the event of your death.** A properly prepared estate plan should, of course, include a document which states who will pay your bills, distribute your property, and otherwise settle

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your affairs after you pass away. In other words, a comprehensive estate plan should include a Will, which will appoint the person who will serve as the Executor or Personal Representative of your estate.

5. **Determining who will receive your property in the event of your death, and how the property will pass to the desired beneficiaries.** A properly prepared estate plan should certainly include a document which states who is to receive your property in the event of your death and how you want the desired beneficiary or beneficiaries to receive the property. The desired distribution plan can be contained in a Will, or it can be contained in a Revocable Living Trust. A Will is the bare minimum, while a Revocable Living Trust, which should be used in conjunction with, and not completely in lieu of, a Will, can provide benefits in addition to those provided by a Will.

C. **State Law Provides Everyone With a Default Estate Plan - However, the Default Plan Is Not Adequate For Most People and Is Almost Never Ideal.** Because it is so important to deal with situations which involve a person's death or disability, the law of each state contains a default estate plan which will apply if a person has not made specific plans. The state law default plan is designed to reflect what the state believes most people would want to have happen in certain situations. For example, the law provides that certain people are given preference over others if it becomes necessary for a court to appoint a guardian to handle your affairs if you become incapable of doing so for yourself. The law also provides that certain people are given preference as health care decision makers, as guardians for surviving minor children, as Executors or Administrators of an estate, and as beneficiaries. The default estate plan set out under state law is generally poor and often results in an undesirable outcome, making it important for all people to undertake estate planning, even if their desires would tend to follow the preferences stated by the law. However, if a person's desires do not coincide with the default estate plan set out by state law, that person has an even stronger need for estate planning. One of our specialties is preparing estate plans for people who have these heightened needs.

D. **Examples of Situations In Which the State Law Default Estate Plan Tends to Be Unsatisfactory.** Examples of situations in which a stronger need for estate planning exists are: a couple in a committed relationship where either or both of the parties have children from prior relationships; parents or grandparents who wish to provide assets for a child or grandchild who has special needs without causing the child or grandchild to be disqualified for Medicaid benefits; and single persons who would prefer friends or trusted professional advisors, rather than blood relatives, to act for them or receive property from them. Another example of a situation in which the default plan does not work well is an unmarried but committed couple, whether they are they are of opposite sexes or the same sex. However, the need to ensure that the default estate plan does not apply is probably highest for committed same-sex couples, because of the strongly negative societal and family pressures which partners in same-sex relationships often face, and because the laws which

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collectively create state default estate plans tend to ignore or even work specifically against same-sex partners.

II. Unmarried But Committed Same-Sex Couples Have an Extra-High Need for Estate Planning, Because the Default State Law Plan Generally Works Against Them.

A. Couples Who Are Not Part of a Legally Recognized Marriage are Generally Considered to be Strangers to Each Other For the Purposes of Most State Laws. Legal marriage is not made available to same-sex couples in all states, although it is becoming increasingly available. While federal law now recognizes couples who are legally married in any given state or foreign jurisdiction as married for all purposes of federal law, most states where same-sex marriage is still not legally available still do not recognize same-sex couples as married. This means that same-sex couples are not able to benefit from most of the many state-law-based legal rights and privileges which legally married spouses receive along with their marriage license.

1. Examples of Some of the Rights and Privileges Denied to Same-Sex Couples But Given to Legally Married Couples. Married couples are considered to be legal members of each other's families, and the spousal relationship is generally considered to be the closest relationship there is under the law. Some (by no means all) of the special rights and protections which are given to spouses by state law include the following:

a) a person's spouse is normally the first person who is given the right to act for that person if she is incapacitated and a guardian is needed to handle the person's finances;

b) a person's spouse is the first person who is given the right to make health care decisions on a person's behalf if she is unable to do so for herself;

c) a person's spouse is the first person who is first given the right to be the Executor or Administrator of the person's estate if the person dies;

d) a person's spouse will receive at least a share of the person's estate even if the person has no Will;

e) a person's spouse has the right to visit the person in a hospital or nursing home;

f) a person's spouse has the right to decide whether to donate the person's organs if she passes away;

g) a person's spouse has the right to claim the person's body if she passes away;

h) a person's spouse has the right to determine where and how the person will be buried;

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i) transfers to a person's spouse can frequently qualify for a deduction against state estate taxes, so that a surviving spouse can often receive a deceased spouse's entire estate without having to pay state estate taxes at the deceased spouse's death (not all states have state-level estate taxes, however, and for federal law purposes legally married same-sex couples do now qualify for a marital deduction against federal estate taxes); and

j) opposite-sex married couples can file joint returns for both federal and state income taxes, and can claim each other as dependents, which often results in a lower overall tax burden for the couple. Joint filing is now available for legally married same-sex couples for federal income tax purposes, but states which do not allow same-sex marriages still require such couples to file separately for state income tax purposes. This can often create a situation in which a couple must have two separate sets of federal law income tax returns prepared: one joint federal return, to be filed, and a second set of federal income tax returns prepared as if the couple were each single, to be used for preparing the couple's state returns.

2. **Without an Adequate, Specifically Prepared, Estate Plan, Other Family Members Are Often Given Preference and Privileges Which Can Allow Them to Shut Out Even a Committed, Long-Term Partner.** Since members of an unmarried couple are considered legal strangers to one another, the partners do not receive any of the above-listed rights, protections, and privileges, and they are also usually denied access to the many other legal benefits, rights, and protections which married couples receive. Some of the above-described privileges, such as the right to file joint state income tax returns, will simply not be available at all. However, a lot of the rights and privileges which are mentioned above will pass to the legally-recognized family members of each partner, even where this would not be the desired result.

   For example, if one partner in a same-sex couple passes away without a Will, the deceased partner's "heirs" will receive any property which passes into her estate, rather than her surviving partner. A person's "heirs," if the person has no legal spouse, will generally be (1) the person's children or other descendants, if any; (2) if no descendants, the person's parents, if either is living; (3) if no parent is living, the person's siblings, in equal shares, with any share which a deceased sibling would have received passing to his or her descendants, if any (i.e., the person's nieces and nephews); and (4) if no siblings or descendants of siblings, to the person's aunts and uncles or cousins. The surviving partner, who has built a life with the deceased partner and is generally the person who the deceased partner would have wanted to receive her property and handle her estate, is left out. This can and often does result in a horrific situation, where a surviving partner is forcibly kicked out of her own home by the other family members of her deceased partner.

3. **Marriage Is an Easily Available Fix for Opposite-Sex Couples; But a Fix Which Is Not Available to Same-Sec Couples.** Same-sex couples, under current Georgia law and an unfortunate

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amendment to the Georgia constitution, can not become each other's spouses, as they can not get married for purposes of Georgia law. Opposite-sex unmarried couples, while they have the same problems as long as they remain unmarried, can get married and thereby enjoy the protections and privileges accorded to spouses. Therefore, while same-sex and opposite sex couples have similar estate planning problems, the easy fix is not available to same-sex couples. This makes estate planning even more critical for same-sex couples than it is for opposite-sex couples, who have often voluntarily chosen to forgo the benefits of legal marriage.

B. A Carefully Designed and Implemented Estate Plan Will Help Members of Same-Sex Couples Ensure That Their Desires Will Be Followed During Their Lives and After Their Deaths.

1. **Even Minimum Planning Is Better Than None.** At a minimum, same-sex couples need to execute basic estate planning documents, which, for each member of the couple, include a Will, possibly a Revocable Living Trust, a Power of Attorney for property, and an Advance Directive for Health Care. The partners need to make sure that these documents clearly state their choices and desires with regard to the various issues which the documents address. By having well-drafted basic estate planning documents in place, the partners can make clear that they intend for their wishes to override the default provisions of state law and help avoid undesired situations under which one partner is completely shut out when the other partner becomes incapacitated or passes away. Without at least minimum estate planning in place, the partners run the risk that, if one of them becomes incapacitated or dies, the legal relatives of the incapacitated or deceased partner (which would normally be that partner's parents, siblings, or adult children) will step in, exercise their state-law rights to control that partner's affairs, and exclude the other partner entirely.

2. **Never Rely on the Promises of Family Members, Even If They Appear to Be Fully Accepting of Your Relationship With Your Partner and to Care About Your Partner.** There have been a number of cases where one member of a long-time same-sex couple was prevented from even visiting the other member in the hospital during a final illness. As mentioned earlier, there have also been cases where the surviving member of a couple was evicted from his or her long-time residence by the heirs of the deceased member. Sadly, in a number of these situations, the partners had believed, prior to the incapacity or death of one of the partners, that the family members of the incapacitated or deceased partner were fully accepting of the other partner and the partner's relationship. In at least one such case, where one partner was the owner of the home in which the couple lived, the partners had even reached a verbal agreement, prior to the death of that partner, with that partner's family members. Under that agreement, the surviving partner was supposed to have been allowed to continue living in the home for the rest of his life. The partners relied on this verbal agreement and did not take further steps to ensure that the surviving partner would receive a legal right to continued use of the home after the death of the owner. When the partner who owned the home actually passed away, the same family members

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who had entered the verbal agreement, on the day of the deceased partner's funeral, not only locked the surviving partner from the home and refused to allow him to even collect his own property, but also took the couple's dog to a shelter for euthanasia.

3. **Ensure that Beneficiary Designations Will Work With Your Desired Estate Plan.** In addition to basic estate planning documents, same-sex couples need to ensure that they properly set up the beneficiary designations on assets such as life insurance, annuities, and retirement savings accounts such as IRAs, and 401(k)s. While it may suffice in some cases for partners simply to name each other as beneficiaries on these types of assets, there are a lot of issues which should be considered when deciding on the most appropriate beneficiary designation, and simply designating each other as beneficiary on these assets may not be the most beneficial approach. For example, if a large life insurance policy exists, it can often be more beneficial, for various tax and other reasons, to have the life insurance policy owned by and made payable to an irrevocable trust rather than having these assets paid directly to a surviving partner. As another example, where a charitable bequest is desired, it may be more beneficial, from a tax standpoint, to name the desired charity as the beneficiary of IRA or 401(k) accounts than to name your partner as the beneficiary, and to have other assets pass to your partner. Part of the preparation of a complete estate plan should involve a careful consideration of assets which will pass according to a beneficiary designation, so that the beneficiary designations can be used to help maximize the benefits of the estate planning done by the partners.

4. **Don't Rely Too Heavily on Joint Ownership of Assets.** Same-sex couples, like opposite-sex couples, often purchase jointly-titled property and hold joint bank and brokerage accounts. Joint ownership of assets, however, should be handled very carefully.

    a) **Joint Ownership of Assets Can Create Tax Problems.** One reason that joint ownership needs to be used cautiously, if at all, is tax-based. Legally married couples can own assets or accounts jointly without having to pay much attention to possible tax consequences, since they generally file a joint return for income tax purposes. Same-sex couples can not file joint income tax returns, which means that the income from the property will generally be reported only on one partner's income tax return, which could result in the income being taxed at a higher income tax rate than might otherwise apply. If the couple is not legally married in some jurisdiction, taxable gifts can still result for federal gift tax purposes, if the couple does not make equal contributions for day-to-day expenses such as mortgage payments and groceries (only one state, Connecticut, currently has a state gift tax). (If a couple is legally married in any jurisdiction, the federal law will recognize the marriage, so federal estate and gift taxes are no longer a problem for married same-sex couples.) Estate taxes may also become an issue at the death of one of the partners if they are not legally married at all, or if a state-level estate tax applies in a state where their marriage is not recognized, because the full value of the jointly owned assets may be included in the

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deceased partner's estate for estate tax purposes even if that partner actually contribute less than all of the assets used to acquire the jointly owned assets. Couples should maintain careful records regarding the acquisition of be used to prove to the state tax authortiy what portion of the property was actually acquired using assets contributed by the deceased partner.

b) **Joint Ownership of Assets May Not Always Result In the Assets Passing Automatically to the Surviving Owner.** Another reason to approach the joint ownership of assets carefully is that joint ownership does not always ensure that the asset will automatically pass to the surviving owner. Bank accounts, if owned jointly in Georgia, will normally automatically become the property of the surviving partner if one partner passes away. However, other property, such as a home or car, will not normally pass automatically to the surviving partner even if the title is held in both of the partners' names. Instead, the property must specifically be held by the partners as "joint tenants," or "with rights of survivorship," in order for the property to pass automatically to the surviving owner.

5. **You May Need to Plan for Estate Taxes if Either or Both Partners Own Significant Assets.** If estate taxes are likely to be an issue because one or both partners in a same-sex relationship own a lot of assets, including the full face amount of any life insurance policies, it becomes critical that the partners undertake careful estate tax-oriented planning in order to minimize the estate taxes which will apply at each partner's death. Legally married couples can leave each other an unlimited amount of property free of estate taxes, using the estate tax marital deduction, which gives them the ability to ensure that no estate taxes are due at the first spouse's death even if the assets included in the first spouse's death exceed the value of the first spouse's estate tax exclusion amount. Under federal law, legally married same-sex couples can now also benefit from the federal estate tax marital deduction, even if the state they live in does not recognize their marriage. If they live in a state which has a state-level estate tax, however, then they may be subject to state estate taxes if the state does not recognize their marriage. In addition, same-sex couples who are not legally married in any jurisdiction do not have access to either state or federal marital estate tax deductions. Careful and sophisticated estate planning can help minimize the potential estate taxes which will be due at the first partner's death. It can also help minimize any estate taxes which will be due at the second partner's death, when the assets pass to the couple's children or other desired beneficiaries.

6. **Planning to Protect Children.** A growing number of same-sex couples include children, either from one or both partners' prior relationships or from the partners' own relationship. If the partners want to ensure that the parent/child relationships in their family are protected, it is critical that proper planning be implemented, especially if the child's relationship to one of the partners is not recognized by the law. Unless a child was legally adopted by both partners, is the biological child of one partner but adopted in a second-parent adoption by the other partner, or

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is recognized as being the biological child of both partners (which is rarely, but occasionally, the case), the partner who is not considered to be a legal parent of the child will not have any legal rights to raise or even have contact with the child in the event of the other partner's death or incapacity. For legally married couples where the surviving spouse is the parent of any surviving minor children, the surviving spouse will automatically continue to raise and have rights to the children. For same-sex couples, however, unless both partners have been able to acquire legally recognized parental status through birth or adoption, the surviving partner may not have any legal rights to continue raising any minor children, and that partner will not receive any preferences under state law to be appointed as the guardian for the children. Instead, the custody of the children may pass to the children's other biological parent, or a member of the deceased partner's legal family, such as a parent or a sibling, may be appointed as the guardian of the child. In many cases, these situations have resulted in the surviving partner of the deceased parent losing the right to raise or sometimes even have contact with children who she loved as her own, and in the children suffering the effective loss of not just one, but two, parents.

III. **Conclusion.** Estate planning is a critical step for same-sex couples who want to build a life together and then protect that life. While same-sex couples in many states are still denied many of the benefits otherwise provided under state law to couples who can enter a legally recognized marriage, a properly designed and implemented estate plan can at least help same-sex couples reduce the impact of this denial and ensure that their interests and their families are protected.