THE IMPORTANCE OF ESTATE PLANNING FOR SAME-SEX AND UNMARRIED COUPLES

BY BROOKE BORG, ESQ.

The words "I do" are magical words in more than one way. Sure, they mean something to the individuals exchanging wedding vows, but they mean even more in relation to property ownership, insurance, parenting, medical decisions, etc. Married couples, by law – and in certain states, including Nevada, registered domestic partners – receive greater benefits than unmarried or unregistered couples, regardless of such couples' sexual orientation. This is why it is so important for unmarried couples to have estate planning documents prepared. Estate planning documents can make up for what the law lacks in providing certain protections for unmarried individuals.

In 2009, Nevada adopted the Nevada Domestic Partnership Act, which allows heterosexual and homosexual couples alike to register as domestic partners with the Secretary of State. Once registered, the law allows domestic partners some of the same rights as married couples. Regardless of whether a couple is married or not, or of the same or opposite sex, it is highly recommended they prepare estate planning documents and leave nothing to chance when it comes to property, financial or health care decisions.

Not every estate plan is right for every person or couple. An estate planning attorney should be consulted to determine the proper planning and necessary documents for each situation. This article discusses some of the issues that consistently arise when representing unmarried individuals. As attorneys, we need to be aware of these issues and have the resources to either advise our clients, or refer them to an estate planning attorney who can better assist them.

Transfer of Property at Death

If someone dies without a will in place, property will be distributed to certain individuals by statute (commonly called Intestate Succession). Chapter 134 of the Nevada Revised Statutes (NRS) provides that if there is a surviving "spouse" and minor children, the estate will be divided among those parties. If there are no children, then the surviving "spouse" will take everything. If no surviving "spouse," but children, the children will inherit everything in equal shares. If no surviving "spouse" or children, then the estate goes first to any living parents and then to brothers and sisters of the decedent. The term "spouse" is placed in quotations here, as the term in the statute also applies to registered domestic partners of the decedents.

A person can avoid having the state dictate their beneficiaries by properly executing a will. A will is important, especially in cases when a person wants an individual, other than one who would inherit through intestate succession, to receive the property. Property-passing by will requires probate, which can be costly and time-consuming. During the probate process, assets are generally unavailable to

beneficiaries. Probate can take six to 18 months or longer, in some cases, and can oftentimes be avoided with proper estate planning before the need for it arises. In cases of unmarried individuals whose assets are subject to probate, there is an increasing occurrence of family members questioning where their property is going. This is especially true when it is a same-sex couple and the relatives of the deceased partner do not agree with their loved one's lifestyle choices.

A trust is probably the most important document for unmarried individuals to have as part of their estate plan, as property owned by a trust is not subject to probate, but rather passes to the beneficiaries set forth in the trust document. Trusts are governed by NRS 163. There are many different types of trusts, and no one type is right for every client or couple. The amount of assets, marital status and goals of the client are all crucial in determining what type of trust to establish. A trust not only names a trustee to manage the trust property, but it can also place certain restrictions on distributions, provide the timing of distributions and account for circumstances that may occur after the drafting of the trust (i.e. the minor beneficiaries reaches the age of majority, beneficiary gets married or divorced or the financial well-being of one of the beneficiaries changes).

Health Care Decisions

Books could be written on the horrors same-sex couples have encountered when attempting to make medical decisions for their partners. Most of these incidents take place when the couple is traveling and, usually, when they are traveling out of the country. Without something in writing stating that a partner may visit the other partner in the hospital, access medical records and make decisions regarding health care (including life support), the facility should not give out those rights or decision-making powers. Anyone 18 or older is deemed an adult and should execute a power of attorney relating to health care decisions.

Financial Decisions

In addition to having a health care power of attorney, a person should also nominate an agent under a Financial Power of Attorney to make financial decisions in the event of the person's incapacity. A common misconception about this document is that it survives death. It does not. Any right an agent has under a Financial Power of Attorney terminates at death. At death, any of these powers go to a trustee of a trust and/or executor of a will. There has been an increased need for financial powers of attorney in the last several years, as more clients have faced Alzheimer's disease and other ailments that make it impossible for the clients to look after their own finances. Oftentimes, these patients can live for many years, unable to manage their own affairs. If an unmarried partner is not a joint account holder or is not authorized to act on certain financial accounts, the partner will not be able to make decisions regarding their incapacitated partner's assets without a Financial Power of Attorney giving him/her that right.

Parenting Rights

Many same-sex couples have children "together." No matter who gave birth to the child, the child, for all intents and purposes, is *their* child. Wouldn't it be nice if the law felt the same way? Without proper documentation in place (i.e. adoption, guardianship), the non-birth parent in an unmarried couple has no rights over the child in Nevada. What can we do to change that? The non-birth parent can either adopt the child or file a guardianship, so that both "parents" can make decisions regarding the child's upbringing, medical treatment, religious beliefs, etc. A will is also helpful when planning for unmarried individuals with children, because it can nominate a guardian at the unmarried individual's death for the minor children of the unmarried individual.

If an unmarried couple is registered as domestic partners, the law states that registered domestic partners are treated the same as married persons for purposes of adopting children. Therefore, the non-birth parent could go through a step-parent adoption process much more easily than if such couple was unregistered.

Probate Avoidance

Probate is a process in which the court becomes involved in the transferring of assets to creditors and heirs of the decedent. Assets titled in a decedent's name alone without a designated beneficiary via contract or operation of law must pass through probate prior to being transferred to the decedent's heirs. Assets that will pass by operation of law or contract include, but are not limited to, life insurance proceeds, retirement benefits and annuities, payable on death designations (i.e. on a bank

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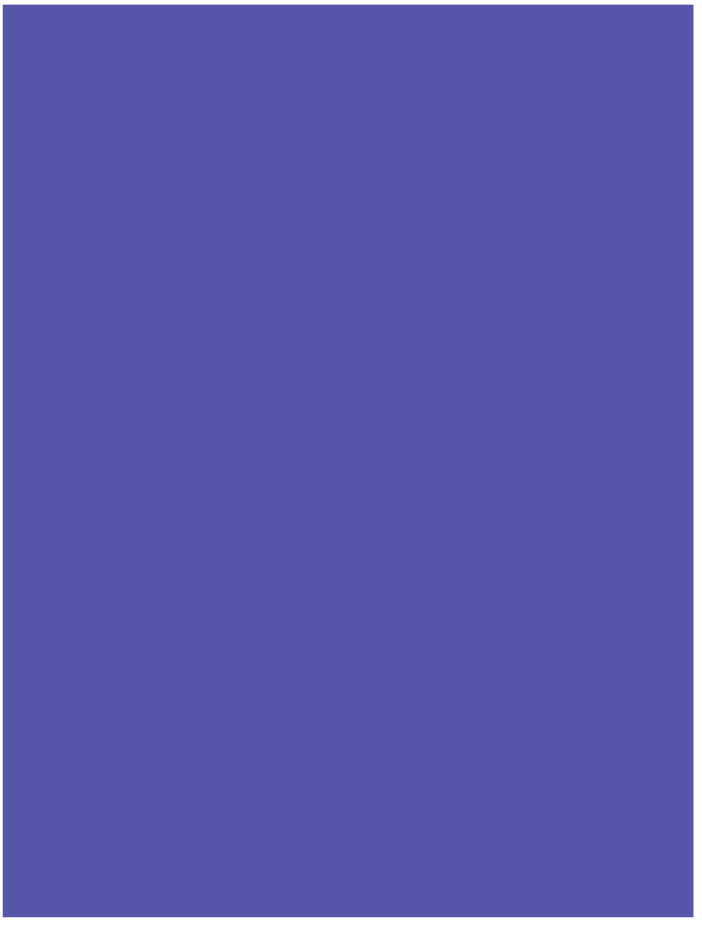

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account), assets that are owned by joint tenants with "rights of survivorship" or trust assets.

Probate is often a time-consuming and expensive process and should be avoided at all costs. Some simple steps to avoid probate are as follows:

1. Review the manner in which assets are titled. The only properties subject to probate are those in the decedent's name alone without a beneficiary. Many couples like to be on titles together to show they are both equal owners, but one must be careful in this, because when titles to property change, there may be unfavorable tax consequences.
2. Regularly review beneficiary designations on accounts to ensure the proper beneficiary and even a second beneficiary (in case the account holder and first beneficiary pass at the same time or the first beneficiary passes before the account holder) is listed.
3. Regularly review estate planning documents. Encourage clients not to wait until a life-changing event happens. Oftentimes, people forget what or who is included in their documents; after a life-changing event occurs, it may be too late to make changes.
4. Encourage clients to talk to their loved ones and ensure everyone is aware of their healthcare wishes.

Estate planning for unmarried couples is more important than planning for married couples, because unmarried individuals are not provided most of the protections that married couples are offered. Because of the complexity of these issues, attorneys should not dabble in this type of law, but instead find an attorney who regularly practices in the area of estate planning and probate to assist clients with drafting these important, life-changing documents. ■

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