

Not at all equal: LGBT couples face estate planning challenges

By Alison Arden Besunder, Esq.

“Marriage. Marriage is what brings us together today.”

Unfortunately, not all marriages are created equal, and New York State’s recent refusal to legalize same-sex marriage is not bringing same-sex couples together but driving them apart.

Marriage confers a “bundle of rights” on two individuals. The federal government defines marriage as a union “between a man and a woman.” This limited definition denies same-sex couples the automatic bundle of rights that are afforded heterosexual couples.

Tax issues

There are two types of tax problems: lifetime and death-time. Married couples enjoy an “unlimited marital” exemption during life without incurring gift taxes and an unlimited deduction at death without incurring estate taxes. Same-sex couples do not enjoy this benefit. A same-sex partner may leave any amount to his or her partner up to the federal exemption (currently an unlimited exemption for 2010 but scheduled to revert to a \$1 million exemption in 2011).

Any assets in the estate above that exemption will be taxed. The absence of the ability to make unlimited lifetime transfers, however, impacts a same-sex couple’s freedom to engage in Medicaid planning (see below). It is important to register as domestic partners in order to obtain the benefit of any tax benefits available in the same-

sex couple’s resident state.

State-based Medicaid

Medicaid is a joint federal and state program that provides long-term care to indigent individuals. For the purposes of Medicaid, New York requires recognition of same-sex marriages legally entered into in other jurisdictions.

Medicaid eligibility will therefore be determined for same-sex couples as with heterosexual couples: Medicaid treats heterosexual domestic partners as financially responsible for each other; it will likely treat same-sex domestic partners similarly.

Children

Children born to a same-sex couple must be adopted by the non-biological parent(s) in order to be recognized as an heir and inherit from the non-biological parent unless that child is specifically named and identified in the non-biological parent’s will (as well as protecting the

non-biological parent’s visitation and custody rights in the event of a separation or divorce). This is also an issue for parents and relatives of the same-sex partner who desire to include any issue of the same-sex marriage in their estate plan.

The failure to engage in estate planning is detrimental to the same-sex couple. With a well-structured trust, couples can save a significant amount of tax. If you want your partner to inherit all or part of your assets, real or personal property, you must have a will.

It is imperative to consult an estate planning attorney well-versed in this area if you are in an unmarried relationship, whether heterosexual or same-sex couple.

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