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New Developments Impact Estate Planning for Same Gender Couples

Over the years, estate planning attorneys have drafted documents for same sex couples (legally married, civil union, or domestic partnership) without knowledge of whether the couple's relationship would ever receive federal recognition. Only couples living in a state which recognizes these relationships will benefit from these rights. In contrast, the federal "Defense of Marriage Act" (see below) does not provide same-sex couples with any rights or benefits (Social Security benefits, immigration privileges, or the marriage exemption for federal estate, transfer, or gift taxes).

Recent state legislation and court rulings in Vermont, Iowa and Colorado have eroded state law prohibitions and provided more benefits and rights to same-sex couples. The recognition of these benefits and rights of inheritance has made estate planning for same-sex couples much easier.

FEDERAL "DEFENSE OF MARRIAGE" ACT

Federal law is controlled by the "Defense of Marriage Act" ("DOMA"). DOMA was signed into law in 1996 and overrides the U.S. Constitutional requirement that each state provide "full faith and credit" to the laws of another state in the case of a same-sex marriage. This precludes the federal government from recognizing same sex marriages or granting them federal benefits, even in a state that grants rights to same sex partners.

Twenty-six states have also passed statutes specifically barring same-gender marriages in their state. These statutes prevent both the recognition of same-sex marriages and same sex relationships of any kind.

INHERITANCE

In the Matter of the Estate of H. Kenneth Ranftle, File No. 4585-2008 (N.Y.L.J., Feb. 3, 2009), New York became the first state or commonwealth to recognize a same sex spouse's rights of inheritance under state law. Under the February 2009 opinion, the

New York Surrogate Court recognized the validity of a same-sex marriage between two New Yorkers conducted in Canada and confirmed that "a person may provide for his/her same sex spouse to inherit his/her estate as a spouse." The opinion further provided that the deceased spouse's family members would not have standing to object to the will.

The ruling in *Matter of the Estate of H. Kenneth Ranftle* was supported by the earlier New York Court of Appeals decision in the case of *Martinez v. County of Monroe*. In *Martinez*, the court addressed the validity of a marriage solemnized in Canada, Massachusetts and any other state where it was legal.

In reaching its decision the court found that New York law has recognized a marriage solemnized outside of the state, with two exceptions, for over a century and that a marriage valid in Canada was entitled to recognition in New York.

MARRIAGE-LIKE RELATIONSHIPS IN OTHER STATES

CIVIL UNIONS

Civil unions are recognized in the states of New Hampshire and New Jersey. The unions provide similar rights and responsibilities as marriage, including: (i) rights under family law (annulment, divorce, child custody, child support, alimony, domestic violence, adoption, and property division); (ii) rights to sue under tort or law concerning spousal relationships (wrongful death, loss of consortium, etc.); (iii) medical rights (hospital visitation, notification, and durable power of attorney); (iv) family leave benefits; (v) joint state tax filing; and (vi) intestate rights of inheritance.

DOMESTIC PARTNERSHIPS

Domestic partnerships are recognized in the District of Columbia (D.C.), California, Maine, Oregon, and Washington. Each recognizes a same-sex couple's rights and benefits in a different way. The states of Oregon and Washington view the relationship as the legal equivalent of marriage. California similarly views the relationship and includes community property rights and the right to support after a separation. In contrast, Maine (disability and inheritance) and D.C. provide limited benefits and rights to domestic partners.

Hawaii has enacted a reciprocal beneficiary law. The law provides that "any two state residents can register as reciprocal beneficiaries, as long as they are over 18 and are not permitted to marry." Couples who register under the law are entitled to certain rights and benefits granted by the state to married couples (hospital visitation, the ability to sue for wrongful death, and property and inheritance rights).

COLORADO

In April 2009, Colorado enacted legislation (House Bill 1260) allowing unmarried individuals (opposite and same sex couples) to share benefits and jointly plan their respective estates through "designated beneficiary agreements." The agreements apply to estate planning, property transactions, medical decisions and death benefits (life-insurance and retirement-plan disbursements). The legislation adds certain default provisions into its state statutes which provides rights, benefits, and protections to a designated beneficiary in situations in which no valid and enforceable estate planning documents exist.

The designation will apply to a: (i) will and codicil; (ii) power of attorney; (iii) medical durable power of attorney; (iv) trust instrument; (v) beneficiary designation (insurance policy, health care coverage, retirement or pension plan, deposit or bank account); (vi) medical treatment declaration; (vii) disposition of last remains; or (viii) marriage license.

The new statutory designated beneficiary agreement will also entitle same-sex couples to the following rights and protections: (i) to acquire, hold title to, own jointly, or transfer inter vivos or at death real or personal property as joint tenants with right of survivorship or as tenants in common; (ii) to be designated as a beneficiary, payee, or owner as a trustee named in an inter vivos or testamentary trust; (iii) to be designated as a beneficiary and recognized as a dependent: (a) under the public employees' retirement system; (b) for local government firefighter and police pensions; (c) of life insurance policies; and (d) of health insurance policies or coverage (if policy provides coverage for designated beneficiaries as dependents); (v) to petition for and have priority for appointment as a conservator, guardian, or personal representative for the other designated beneficiary; (vi) to visitation in a hospital, nursing home, hospice, or similar health care facility; (vii) to act as a proxy decision-maker or surrogate decision-maker for medical treatment decisions; (viii) to receive notice of the withholding or withdrawal of life-sustaining procedures and challenge the validity of a declaration as to medical or surgical treatment; (ix) to act as an agent and to make, revoke, or object to

anatomical gifts; (x) to inherit real or personal property through intestate succession; (xi) standing to receive benefits pursuant to the "workers' compensation act of colorado"; (xii) standing to sue for wrongful death; and (xiii) to direct the disposition of the other designated beneficiary's last remains.

COMMENT:

Until more states recognize same-sex marriages through legislative action (Vermont), court ruling (Connecticut, Massachusetts, and Iowa) or create marriage-like relationships (District of Columbia, California, Maine, Oregon, Washington, New Hampshire and New Jersey), estate planning can only be accomplished for same-sex couples through formally executed documents (Last Will and Testament, Trust, Durable Power of Attorney, Health Care Surrogate Designation, and Living Will) and alternative strategies (lifetime gift exemption, pay-on-death accounts, beneficiary designations, and Grantor Retained Trusts (annuity and income).