South Florida Estate Planning Law

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Same Sex Couples Need Estate Planning As Much as, or Even More Than Legally Married Couples

Over the past few years, one of the most active and contentious political issues in this country has been that of gay, or same sex marriage. Proponents of same sex marriage have argued that a married couple automatically has "1400" rights just by virtue of being married. They argue that since same sex couples are unable to get married, that there is no method for them to obtain these same rights with regard to their partners.

As this is a legal blog and not a political blog, I do not want to discuss the *political* issue of gay marriage here. Professionally though, as an estate planning attorney located in Broward County, it is my job to best serve my clients. There is a large gay community living in South Florida -- whether it is Miami Beach, Fort Lauderdale, Wilton Manors, or just in the community at large. It is important for same sex couples to know that through proper estate planning, they can obtain many (but not all) of the abilities (not necessarily "rights") that a married couple has with regards to inheritance, hospital visitation, and the power to make medical decisions for their partners.

What's even more important for same sex couples to know is that if they have ***not*** engaged in proper estate planning, because they are not considered related to their partner, they will have virtually **none** of the rights that a legally married couple has with regards to these issues.

Before moving on, I do want to state that for Federal estate and gift tax purposes, there is no equality. There is *nothing* that can be done to match the incredible power of the *marital deduction* in which an individual may give an *unlimited* amount of property to their spouse tax free, either during life or at death. However, a good estate planning attorney should be able to suggest some alternative tax reduction strategies for same sex couples including using up your lifetime gift exemption, paying for your partner's education and medical bills directly, or a GRAT. But unless a person has at least $3.5 million, the estate tax is not necessarily something that they should be worrying about right now.

But what does concern same sex couples is the same thing that concerns all couples -- the right to visit their partner in the hospital when sick, to make decisions for their partner when their partner is unable to due to incapacity, and to inherit property from their partner upon their partner's death.

PROPERLY DRAFTED ADVANCED DIRECTIVES, INCLUDING A DURABLE POWER OF ATTORNEY AND HEALTH CARE SURROGATE ARE ESSENTIAL

As I've blogged about previously, Estate Planning is about Planning for disability as well as death. With a properly drafted and executed durable power of attorney and designation of health care surrogate, an adult can choose any person they want to make financial and/or medical and health care decisions for them, in the case the person is unable to make them for themselves. If a person does not have these documents in place, then a hospital will look to that person's "spouse" (to which that person is *legally* married) or in the event of no spouse, blood relatives. It is essential that same sex couples have properly executed Advanced Directives, in which they designate their partner as their "attorney in fact" for health care and other decisions.

Note: I am aware of the Langbehn/Pond case, where a hospital in Miami allegedly denied visitation to the Lesbian partner of a tourist who had a heart attack on a cruise and then later died, even though she had a properly executed health care surrogate, but I believe (hope) that instance was an aberration. If anything, this case is evidence of what can happen without the proper documents (and an educated hospital staff that understands them).

A PROPERLY DRAFTED AND EXECUTED WILL OR A REVOCABLE LIVING TRUST, (AND/OR PROPERLY STRUCTURED JOINT OWNERSHIP OF PROPERTY OR BENEFICIARY DESIGNATIONS) IS ESSENTIAL FOR SAME SEX PARTNERS TO INHERIT EACH OTHERS PROPERTY UPON DEATH

In a previous blog post I discussed that if a person dies without a will, it is known as intestacy, and the State determines how their property is distributed per a predetermined set of rules. While intestacy is not an ideal situation, the order in which people inherit from an intestate decedent is set up to give the decedent's surviving spouse priority over everyone else. In Florida, when a person dies survived by a partner to whom they were not legally married (either gay or straight), then the partner has no intestate inheritance rights at all, and the Decedent's property that is subject to probate may be inherited by blood relatives that the person hasn't seen or spoken to in years, instead of by the loved one they spent their life with.

But this can be solved with proper planning. If a decedent (gay or straight) engaged in estate planning before their death and executed a Will or a Trust leaving their property to their partner, then the problem of the "wrong" person inheriting through intestacy disappears. Part of the problem may also be solved by owning property as joint tenants with rights of survivorship, using Pay On Death Accounts, and making sure that the beneficiary designations on life insurance and retirement accounts are properly completed. But these steps should be done as part of an entire plan, in conjunction with a Will or Trust, as it might miss assets, which would then be subject to intestacy.

While I'm sure that the fight over gay marriage will linger on for years, same sex couples can and should take the steps necessary today to engage in proper estate planning to protect both themselevs and their loved ones.

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Law Offices of David A. Shulman, P.L
Fort Lauderdale, FL