

PRACTICE IMPLICATIONS: ESTATE PLANNING FOR SAME-SEX MARRIED COUPLES

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I. IMPACT OF MARRIAGE ON EXISTING DOCUMENTS

A. Wills

1. Automatic Revocation. Under Oregon law, a Will is revoked by a subsequent marriage unless the Will shows an intent that it not be revoked by the marriage or was drafted under circumstances establishing that it was in contemplation of the marriage.

While it can be argued that Wills explicitly stating that the individuals consider themselves life partners should not be deemed revoked under this law, this is uncharted legal territory, and *any* newly married couple with existing Wills should contact their lawyer and do simple codicils to evidence their intent that their existing Wills are not revoked by the marriage. Alternatively, the couple could sign new Wills. In either case, because of the impending legal challenges for same-sex marriage, the document should contain a provision that specifically addresses the circumstances of the marriage and the couple's intent that the Will and the provisions in favor of the spouse not be changed by any future changes to the legality of their marital status. In addition, the provision should address the potential that the relationship will be severed by a legal dissolution of the marriage.

Example: I married _____ on March 4, 2004, in Multnomah County, Oregon. All references to "my spouse" are to him/her. In the event our marriage is voided or becomes invalid for any reason, it is my intention that this instrument continue in full force and effect, and that provisions naming _____ not be revoked. Notwithstanding the above, if our marriage is legally dissolved, I intend that this Will be revoked under the provisions of Oregon law then in effect.

2. Intestate Succession. If a Codicil or a new Will is not executed, the prior Will may be considered legally revoked. Upon the death of one of the spouses, he or she will be treated as having died without a Will and his or her assets will be distributed according to Oregon's intestate succession laws. This may or may not reflect the couple's intentions. The intestate distribution rules generally provide that the surviving spouse will receive the entire estate if there are no children or if all of the children belong to both spouses. If the decedent's children are from a previous

marriage, the surviving spouse receives one-half of the estate and the decedent's children share equally in the other half.

The intestate laws may or may not accomplish the client's wishes. For example, if either spouse has a child who is not the biological or adopted child of the other spouse, 50 percent of the estate will pass to the surviving spouse and 50 percent to the decedent's children.

B. Trusts

1. Testamentary Trusts. Any testamentary trust that the decedent may have included in the revoked Will, such as a trust to hold the assets on behalf of a minor until the minor attains a specified age, may no longer be effective because the Will, and all of its provisions, may be deemed to be revoked.

2. Revocable Living Trusts. A Revocable Living Trust is not revoked by a subsequent marriage under Oregon law. However, the pourover Will that is routinely executed along with the Revocable Living Trust will be revoked by the subsequent marriage. Consequently, the overall estate planning may no longer be coordinated.

C. Powers of Attorney

Powers of Attorney for Finances should remain valid and should not be affected by the subsequent marriage. However, some Powers of Attorney for Finances have tax-related provisions that may be impacted by marriage.

D. Advance Health Care Directives

Advance Health Care Directives should remain valid.

E. Other Documents

Any documents that the clients may have signed regarding the disposition of their remains or the nomination of guardian/conservator should remain valid.

II. ESTATE PLANNING AFTER THE MARRIAGE

While marital status does confer some legal rights, it is not an estate planning panacea. Spouses must still affirmatively appoint each other to make financial and healthcare decisions in the event of incapacity. Further, as discussed above, a spouse will not necessarily inherit the entire estate if the decedent spouse had children from a prior marriage.

A. Financial Decision Making

It is a common misconception that spouses can make financial decisions for spouses who are incapacitated. Some examples of the types of actions that a spouse cannot take on behalf of an incapacitated spouse are: selling the house; getting a mortgage or home equity line; dealing with life insurance, retirement plans, or other separately owned assets; signing tax returns; canceling separately held credit cards. Most spouses name each other in Powers of Attorney for Finances that give each other the authority to handle these matters.

B. Health Care Decision Making

An Advance Health Care Directive gives a person the opportunity to name a healthcare representative as a surrogate medical decision-maker. Although there are provisions in Oregon law giving a spouse priority to make decisions about withholding or withdrawal of life support in certain situations if an Advance Health Care Directive has not been executed, the law does not clearly give a spouse priority to make other health care decisions, such as whether to have surgery or to begin treatment. If there are disagreements between the spouse and adult children, it may require a court to appoint a guardian. An Advance Health Care Directive gives the client the chance to say who will be the primary decision maker.

The Advance Health Care Directive also gives the client the opportunity to give instructions to the health care representative about withholding or withdrawal of life support.

C. Disposition of Property at Death

If someone dies without a Will or Revocable Living Trust, the Oregon intestacy statutes will direct 100 percent of the estate to the spouse if the decedent has no children, or if all of the children are the issue of both spouses. However, if the decedent had children from a prior marriage, the surviving spouse will only inherit 50 percent of the estate. To ensure that property passes at death to the intended person(s), it is advisable that clients execute new Wills and/or Revocable Living Trusts after the marriage.

III. LEGAL ADVANTAGES AND DISADVANTAGES TO MARITAL STATUS

A. Preference in Decision-Making

There are a number of areas in which the law provides that a spouse has a preference in making decisions. Among these are the following:

- Possible preference in court appointments as guardian or conservator
- Authority to make decisions regarding disposition of remains

- Authority to make decisions regarding withholding or withdrawal of life-sustaining treatment

B. Spousal Elective Share

If the deceased spouse did not include the surviving spouse to receive a share of the estate in his or her Will, the surviving spouse can elect to take 25 percent of the probate estate (with some limitations). If this is not the client's intent, it is advisable for the parties to sign a waiver of the elective share. It is not uncommon for heterosexual couples to do this, either in a premarital agreement or a separate document.

C. Support for Surviving Spouse

A court can order that the estate should provide for the support of the surviving spouse and dependent children, which will have priority over most creditor claims. Also, the law allows the spouse and dependent children to stay in a house owned by the estate until one year after the death of the deceased spouse. Of course, if the house passes automatically to the surviving spouse by way of title, or to the surviving spouse under the Will after payment of creditor claims, use of this provision will not be necessary.

D. Estate Tax Consequences

Under the federal Defense of Marriage Act, same-sex marriages are not recognized for purposes of federal law. While this may be unconstitutional, federal estate tax laws that benefit "spouses" may not currently apply. For example, there is an unlimited marital deduction under federal law for both federal estate and gift taxes for any transfers between spouses. This deduction may not apply to same-sex spouses.

The Oregon inheritance tax affects estates of people who die with estates in excess of \$850,000. There is a marital deduction that allows a deceased spouse to leave the entire amount to the surviving spouse without an inheritance tax at that time. Presumably this will apply now to Oregon married same-sex couples.

However, because many of the Oregon inheritance tax laws are intertwined with federal law, the application of these laws to same-sex marriages will be subject to interpretation over the next several months and years.

E. Public Benefits

Many public are benefits generated from federal programs, and at this time the federal Defense of Marriage Act disallows recognition of same-sex marriages for purposes of federal law.

Some public benefits programs are state funded, or are governed by statutes and rules at the state level. Eligibility for these programs will be affected by marriage. Whether marital status will be advantageous or disadvantageous will depend on the circumstances. For example, there are Medicaid rules that protect a spouse from impoverishment when the other spouse needs expensive long-term care. On the other hand, the income and assets of both spouses will be counted for purposes of eligibility for benefits that are based on financial need. People who receive public benefits are well advised to obtain legal advice about the ramifications of marriage.