HOOK
LAW CENTER
SPECIAL REPORT

Estate Planning for Unmarried and Same Sex Couples in Virginia

This Special Report is brought to you by

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A complete estate, asset protection, and financial plan should address your needs as well as the needs of your partner, children, and other family members. The planning process requires you to consider a wide range of legal financial, emotional, and logistical issues. The failure to plan and to take into account the needs of your family will cause you or your family to incur unnecessary expenses, taxes, effort, delay, stress, and may cause you to run out of money during your lifetime, spend your children's inheritance, and rely on your children or other family members for financial assistance. While good planning can avoid or mitigate many of the challenges same-sex couples face in Virginia, some people overlook basic issues that do not first come to mind during the estate planning process. There are issues which arise which are not often thought of as "legal" in nature. These include many medical decisions, such as a partner's right to visitation in a mental health unit. These secondary problems and alternate scenarios must be addressed.

For unmarried and same-sex couples in Virginia, there are many unique legal issues to consider during the planning process. While some aspects of planning for married couples are similar to unmarried couples, many others are vastly different. Because of legal, religious and societal issues, unmarried and same-sex couples face real challenges to the execution of their wishes. In Virginia, same-sex marriage or marriage-equivalent registrations or civil unions are unavailable, and Virginia does not recognize marriages and marriage-equivalent registrations that occurred in other states. To prevent unintended results to their partner and family, it is critical for unmarried and same-sex couples to execute detailed and legally enforceable instructions concerning the management of their financial and health care in the event of disability, and the disposition of their assets and remains upon death.

MANAGING OF YOUR PROPERTY AND PERSONAL AFFAIRS DURING A PERIOD OF DISABILITY

One of the most important issues that unmarried and same-sex couples must consider is whether their partner will be able to handle the management of their property and personal affairs during a period of disability, also known as substitute financial decision making. Unfortunately, without proper estate planning, the answer is at worst, "no," and at best, "maybe."

The legal tool typically used to address substitute financial decision making is a **General Durable Power of Attorney** ("POA"). A POA is an instrument by which a person, known as the principal, designates another person, known as the agent, to manage the principal's assets and financial affairs. The POA does not terminate upon the principal's incapacity or disability. The POA can either be effective upon its

execution ("immediately effective") or effective upon the principal's incapacity or other event ("springing").

By executing a POA, you can make your own decision as to who will be your agent, whether that will be your partner or another person of your choice. A good POA should also appoint a successor agent who can act in the event that the primary agent is unwilling or unable to do so. It is important to recognize that a POA is not merely a form, and there is no one POA that is suitable for all individuals. Your POA should be drafted to meet your specific needs and circumstances.

If you fail to execute a POA and later become incapacitated or otherwise unable to make your own decisions, then someone will have to petition a court to be appointed as your guardian and/or conservator. A guardian is responsible for making decisions regarding the personal affairs of an incapacitated person, such as support, health care, education, and residence. A conservator is responsible for managing the estate and financial affairs of an incapacitated person. In many cases, the court will appoint the same person as both the guardian and conservator of the incapacitated person. The appointment process is lengthy, expensive, and often embarrassing. It invites the prospect for disputes over who will be appointed as the guardian and conservator. After their appointment, both the guardian and the conservator of the incapacitated person must file annual reports and accountings. For these reasons, it is important to execute a POA while you have the ability and capacity to do so.

Substitute Health Care Decision Making and End of Life Decisions

In addition to planning for the management of your financial affairs, you should provide a plan for your health care decision making during a period of disability. Virginia has adopted the Advance Health Care Directive Act. This Act authorizes you to: (1) appoint an agent to make health care decisions for you if you are disabled, (2) give instructions concerning your health care if you are dying, and (3) authorize health care providers to keep your family informed. In the absence of your ability to make your own choices, Virginia law provides for an order of priority for making these types of decisions. The order of priority includes one's guardian, spouse, adult child, parents, adult siblings, and other blood relatives, but makes no mention of a partner. Only through the preparation of the proper documents, can you assure that your partner has visitation rights and is able to assist you during a period of disability.

A **Medical Power of Attorney** appoints an agent to make health care decisions if you are unable to do so. As with the POA, it is strongly encouraged that you also name a successor agent. A Medical POA may also authorize an agent to make decisions concerning visitation of the principal and, upon death, to make an anatomical gift of all or part of the individual's body. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prohibits the disclosure of one's private health information. Therefore, it is important that a Medical POA be accompanied with a HIPAA waiver, so that the agent named in the Medical POA has full access to the principal's medical records.

A **Living Will** allows you to make your wishes known regarding end-of-life decisions, such as the providing, withholding, or withdrawal of life support. If you remember some of the high profile cases of the past, such as

Terry Schiavo and Nancy Cruzan, you will recognize that the lack of a Living Will can lead to expensive and adversarial litigation between your family and loved ones in order to carry out your wishes.

Hook Law Center provides both of these important legal tools to its clients together in document called an **Advance Medical Directive**. To make sure that your Advance Medical Directive is always accessible, it may make sense to register it online with an organization such as Docubank®

Disposition of Your Assets Upon Your Death

A proper estate plan allows you to ensure that your assets are distributed to the person(s), and in the manner that you choose. The plan will do so in the most efficient manner and at the lowest possible cost. For unmarried and same-sex couples, much like the laws dealing with Advance Medical Directives, the default rules established in Virginia law dealing with the disposition of your assets upon your death are likely to be contrary to your wishes. The most common tools to use to accomplish these goals are a **Last Will and Testament** and a **Revocable Living Trust**.

A **Last Will and Testament** (also known as a "Will") is an instrument in which you appoint an executor to settle your estate and provide for instructions for the distribution of your assets upon your death. If you die without a Will (also called dying "intestate"), Virginia law provides for a distribution of your assets in a manner that may be contrary to your wishes. Notably, the law assumes that you would prefer that your blood relatives inherit your estate and makes no provision for your partner. Therefore, this is another area of estate planning that is absolutely crucial to unmarried and same-sex couples.

If you have minor children, you are also able to name a guardian for these children in your Will, in the event that both partners pass away.

A **Revocable Living Trust** (also known as a "living trust") is a trust designed to dispose of your assets at your death and serves as a Will substitute, avoiding the probate process. A living trust is established and can be funded while you are alive, typically appointing yourself as the trustee. The trust agreement allows you to appoint your partner as your successor trustee, in the event that you cannot serve in this role yourself due to your incapacitation or death. Upon your death, the successor trustee distributes the assets, either outright, or in further trust, as provided for in the trust agreement. A living trust is revocable, meaning it (like any other documents discussed in this report) can be changed at any time prior to your death.

One big advantage of a living trust is that it is not a document of public record and, therefore, provides privacy as compared to a Will. This may be especially useful if you would prefer that your relationship to your partner remain confidential. Living trusts may also provide advantages if you own real property in more than one state. A revocable trust is not subject to probate, which means that family members have a significantly lower likelihood of finding a way to challenge it compared to a simple will. However, if family members have a remainder interest after the partner's lifetime, it is possible they would still have standing to force an accounting of the trust. One technique to avoid this remainder interest problem a significantly lower likelihood of finding a way to challenge it compared to a simple will. However, if family members have a remainder interest after the partner's lifetime, it is possible they would still have standing to force an accounting of the trust. One technique to avoid this remainder interest problem would be the

usage of inter-vivos gifting for biological family members and an outright transfer of the trust corpus to the partner after death. While this does create a risk that the partner would transfer assets to a new partner, it would also create a lower chance of litigation. It is also worth considering whether using a third party trustee would decrease the stress on the partner.

If you intend to nominate your partner as the guardian of your minor child(ren), and fear that others will challenge your choice of guardian, it is important to make sure that you name your partner as the trustee of any trust subsequently established for your children as part of your estate plan. That way, even if a challenge is successful, you can ensure that your partner continues to have a relationship with the children through the terms of the trust agreement. Statistics show a higher likelihood of a dispute among family members when a same-sex partner who has children from a previous relationship grants a child's guardianship to the partner. Thus, it is important to consider finding a back-up guardian who is respectful of the partner's relationship with the child.

OTHER ISSUES TO CONSIDER

Virginia's "Affirmation of Marriage Act" (Virginia Code § 20-45.3) prohibits any civil union, partnership contract, or other arrangement between persons of the same-sex purporting to bestow the privileges or obligations of marriage. This includes Domestic Partnership Agreements. Therefore, it is important that any agreement or contract that is part of your estate plan be reviewed closely to ensure that it does not conflict with this law.

If you have been married or entered into a civil union in a state that recognizes such a legal status and now live in Virginia, it is important to know that Virginia Code §§ 20-45.2 and 20-45.3 prohibits marriages and civil unions between persons of the same-sex, making them void and stating that any contractual rights created by such are also void and unenforceable.

Gift & Estate Taxes: Unmarried and same-sex couples are unable to take advantage of the marital deduction for either inter vivos (during life) or testamentary (at death) gifts to their partner. They are also unable to use certain strategies of minimizing estate taxes, such as credit shelter or marital trusts. Therefore, if you or your partner may have a taxable estate at your death, it is important to consult with an experienced attorney to explore other methods of reducing your potential tax burden. It is noteworthy that the constitutionality of the Defense of Marriage Act is currently being reviewed by the Supreme Court. A decision is likely to occur in early 2013.

Hospital Visitation: On July 1, 2007, Virginia enacted a law mandating that licensed hospitals have a policy in place that allows patients to decide who may visit them, subject to other restrictions contained in the visitation policy including, but not limited to, those related to the patient's medical condition and the number of visitors permitted in the patient's room simultaneously. (Virginia Code § 32.1-127 and Virginia Administrative Code 12 VAC5-410-230F). Hook Law Center can prepare a document for you that, in the event that you are unable to express your preference, indicates that you would like your partner to be able to visit you while in an assisted living facility, hospital, nursing home, or other facility where you may be a patient.

Arrangements for your Funeral and the Disposition of your Remains: Virginia law allows you to designate in a signed and notarized writing, an individual to make arrangements for and be responsible for your funeral and the disposition of your remains. The person that you designate has priority over all other persons who would otherwise be entitled to make such arrangements, so long as a copy of the writing is provided to the funeral service establishment and to the cemetery, if any, no later than 48 hours after the funeral service establishment has received your remains.

Ownership of Real Property: Married individuals have a form of property ownership available to them called "Tenants by the Entireties." This form of ownership is not available to unmarried and same-sex couples. Therefore, you should review the deeds to any property that you and your partner own to make sure you understand the consequences of your form of ownership and discuss whether a different form may better suit your estate and financial planning goals. However, transferring a deed to a partner in JTWROS is a permanent decision.

Designations of Beneficiaries: The presumptions of most insurance and financial designation of beneficiary rules do not provide for a partner, instead defaulting to a pattern similar to intestacy laws, as discussed above. If you would like your partner to inherit these assets, a careful review of these plans and their designation of beneficiary forms is crucial. If you own qualified retirement plans, such as 401ks or IRAs, then there are also federal income tax issues that you should consider in making your beneficiary decisions.

Long-Term Care Costs: When thinking about how to pay for the ever-increasing cost of long-term care, many conversations include Medicaid and various pensions available from the Department of Veterans Affairs ("VA"). However, Medicaid rules do not take into account unmarried couples, making qualification more difficult. Also, VA benefits are not available to surviving partners as they are for surviving spouses. Therefore, it is important to evaluate how you will pay for your long-term care, and investigate whether you need to purchase a long-term care insurance policy.

Pet Ownership: If you and your partner have pets, you may want to consider the use of a Pet Trust. A Pet Trust is a trust created by a donor to provide instructions and funds for the care of his or her pets during his or her disability, or after his or her death. The Pet Trust will contain instructions concerning care of the pets, and the management of funds to pay for their care and burial.

Special Needs Trust: If a loved one is disabled, you will want to consider establishing a Special Needs Trust for that individual. A Special Needs Trust can be created by the donor during his or her life or can be created by will. Its purpose is to enable the donor to provide for the continuing care of a disabled partner, child, relative or friend. The beneficiary of a well-drafted special/supplemental needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. Additionally, the beneficiary will not lose eligibility for needs-based benefits, such as Supplemental Security Income ("SSI"), Medicaid, or low-income housing.

Spendthrift Trusts: If a partner is concerned that a surviving partner may waste an inheritance, a spendthrift trust may be appropriate. Such a trust has a third party trustee with the power to withhold distributions. A spendthrift trust could pay for the living costs of a surviving partner without paying for the costs of that partner's new domestic partner.

Irrevocable Life Insurance Trusts (ILITs): Although the estate tax exemption is currently $5,250,000 the lack of a marital deduction may make some wealthy same-sex couples consider utilizing life insurance planning. An ILIT is a method for ensuring that life insurance proceeds remain outside the taxable estate.

Surrogate Planning Agreements: The same-sex community has increasingly taken on the traditional role of parent. These arrangements often utilize advanced scientific techniques such as in-vitro fertilization. Shared parenting agreements, as well as state policy, often favor the surrogate parent in a parenting disagreement. Thus, it is important to realize that the court's opinion as to the best interests of a child after an agreement may consider a surrogate's sexual orientation in such an agreement. Same-sex couples are best advised to consult legal counsel prior to parenthood.

CONCLUSION

All unmarried and same-sex couples should consult with an attorney with experience in estate and financial planning, tax issues, and the federal and state laws pertaining to unmarried and same-sex relationships. While having a comprehensive estate and financial plan in place is important for all individuals, this report explains why it is even more important for unmarried and same-sex couples. If you do not execute the proper estate planning documents, your partner will likely have no rights in making financial or medical decisions on your behalf and will not inherit from your estate. Further, the default rules that are in place instead turn to individuals that may be contrary to your wishes. While most people don't like thinking about and discussing the issues raised by this process, by doing so, you can save time and money in the long run, avoid unnecessary litigation and disputes, and ensure that your wishes are respected.

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