New Jersey Law Journal

VOL. 214 - NO 2 MONDAY, OCTOBER 14, 2013 ESTABLISHED 1878

IN PRACTICE

TRUSTS AND ESTATES

Modern Estate Planning for Same-Sex Couples

Despite new regulations affording greater rights, couples still need to protect themselves

By Mark R. Friedman

In February 2007, Lisa Pond was on the deck of a cruise ship docked in Miami, waiting to set sail on a family vacation. She was watching her children play basketball when she suddenly collapsed. Pond had suffered a brain aneurysm and was taken off the ship and rushed to a nearby hospital. Janice Langbehn, her partner of 17 years, raced behind in a taxi with the couple's young children. However, Langbehn alleged that when she and the children arrived, hospital staff refused to let them visit Pond, and told Langbehn she was in an "antigay city and state." Langbehn says that for nearly eight hours, she tried in vain to persuade hospital staff to let her visit her dying partner. By the time she and the children were finally allowed in, Pond had already fallen into a coma and died shortly thereafter. (Tara Parker-Pope, "Kept from a Dying Partner's Bedside," *N.Y. Times*, May 18, 2009, at D5.)

This case caught the attention of President Obama, who ordered the Department of Health and Human Services (HHS) to issue new rules on hospital visitation. HHS issued these regulations, codified at 42 C.F.R. 482.13(h) and 42 C.F.R. 485.635(f), in November 2010, and also issued guidance in December 2011. The regulations require all healthcare facilities that accept Medicare or Medicaid (i.e., nearly all hospitals and long-term care facilities) to have written visitation policies, inform patients of their rights to authorize any visitors they choose and forbid visitor discrimination based on race, religion or sexual orientation, et al.

Yet, despite these new rules, discrimination persists — even in New Jersey. One plaintiff in a lawsuit alleged that, in 2012, a New Jersey hospital denied him visitors and treatment after a doctor learned he was gay, remarking: "This is what he gets for going against God's will." (Chris Fry, "Doctors with Gay Bias Denied Meds, Man Says," *Courthouse News Service*, June 1, 2012.)

On Sept. 27, Judge Mary Jacobson of Mercer County Superior Court ruled that New Jersey must allow same-sex couples to marry by Oct. 21. *Garden State Equality v. Dow*, No. L-1729-11 (N.J. Super. Sept. 27, 2013). However, Gov. Chris Christie said that the state will appeal the ruling.

In the face of this uncertainty, it is vital that same-sex couples protect themselves with a well-drafted estate plan. During the most sensitive times in life, estate planning can ensure that same-sex partners have the right to visit their partners, obtain medical information, care for children, inherit property, make medical and financial decisions and more.

Although estate planners typically focus on traditional families, same-sex couples comprise a significant and growing element of the American family landscape. The 2010 U.S. Census counted more than 900,000 same-sex couples living together, and that figure had nearly doubled since the 2000 census. There is a profound need for estate planning services for these couples, both because they face discrimination and because the law around same-sex unions is unsettled. Attorneys can serve same-sex couples well by creating estate planning documents that protect their rights.

First and foremost, same-sex couples should have an advance directive for health care (ADH). This instrument can be comprised of an instruction directive (a.k.a. living will), which allows an individual to state his wishes regarding end-of-life and other care, and a healthcare proxy, which allows the individual to appoint someone as a health-care representative to make medical decisions when the individual lacks capacity. An

Friedman is an estate planning and special needs attorney with FriedmanLaw in Bridgewater (SpecialNeedsNJ.com).

ADH can include either of these provisions or both.

Under the new HHS regulations, an individual can use an ADH to designate someone with the authority to exercise her visitation rights when she is incapacitated. If a same-sex partner is designated, then that partner has the unequivocal legal right to visit (subject to the same reasonable restrictions as other visitors). The patient's parents, siblings or other family members cannot prevent her from visiting.

An ADH can also be used to grant a partner HIPAA waiver rights. HIPAA prevents health-care providers from disclosing medical information without the patient's consent, and provides a vague standard on when these requirements can be waived when consent cannot be obtained (see 45 C.F.R. 164.510). Consequently, doctors and other staff may refuse to provide even basic information to partners. An ADH can be used to waive patient privacy rights and avoid this problem.

An estate plan can also include a power of attorney, in which an individual appoints someone he trusts to manage his financial affairs. Without a power of attorney and ADH, if an individual loses decision-making capacity, a guardian will have to be appointed by a court. Most people would prefer to avoid this, as guardianship proceedings are often expensive and emotionally painful. In addition, unless the couple are spouses or domestic or civil-union partners, the judge might appoint a relative over the same-sex partner who can make life very difficult for the partner.

No estate plan is complete without a will, in which an individual directs who will receive her property when she dies. Without a will, an individual's property is distributed by intestacy. In New Jersey, a spouse or domestic or civil-union partner has the right to inherit property under intestacy, but a partner outside a civil union or domestic partnership does not. Couples with children should also use a will to designate a legal guardian.

Wills are also used for tax planning. In this area, there are great advantages to marriage and civil unions. There are three so-called "death taxes" — federal estate tax, New Jersey estate tax and New Jersey inheritance tax. Money left to a spouse, civil-union partner or domestic partner is not subject to inheritance tax. Money left to a spouse or civil-union partner (but not a domestic partner) also qualifies for the marital exemption for New Jersey estate tax. This means married and civil-union couples can leave unlimited amounts to their partners free of New Jersey estate tax (but these amounts are taxed when the second partner dies).

Federal estate tax currently is not a concern for most people because, as of 2013, estates valued under $5.25 million (including lifetime gifts) are exempt from federal estate tax. However, there has been much political discussion about reducing the exemption amount, and for larger estates the federal tax is a significant burden, with a maximum rate of 40 percent.

With regard to federal estate tax, after the recent Supreme Court decision in *U.S. v. Windsor*, 570 U.S. __ (2013) (holding Section 3 of the Defense of Marriage Act unconstitutional), same-sex married couples can now take advantage of the marital exemption and portability. The legality of same-sex marriage, however, is uncertain in New Jersey, and civil-union couples are not legally married. However, the Internal Revenue Service announced in August that it would recognize couples as married based on the state of ceremony. In other words, regardless of where a couple resides, if the marriage was performed in a state that permits same-sex marriage, they are considered married for tax purposes. This means that to take advantage of the federal marital exemption, New Jersey couples need only cross the border to New York, where same-sex marriage is fully legal.

Finally, for assets that pass outside a will, such as an individual retirement account (IRA) or life insurance, beneficiaries should be designated. A recent case demonstrates why.

In *Cozen O'Connor v. Tobits*, 2013 U.S. Dist. LEXIS 105507 (E.D. Pa. 2013), Sarah Farley married her female partner in 2006. Two weeks after the wedding, Farley was diagnosed with cancer, to which she succumbed in 2010. Shortly after her death, a legal battle ensued between Farley's parents and spouse over who should receive her assets.

Farley had married in Toronto, lived in Chicago and worked for a Philadelphia law firm. In Canada, same-sex marriage is legal. Illinois, like New Jersey, recognizes foreign same-sex marriages as civil unions, and treats civil-union partners as surviving spouses. Pennsylvania does not recognize same-sex unions in any form. (Note that as of September, a bill has been introduced to the New Jersey legislature that would fully recognize foreign same-sex marriages.)

Farley had participated in her firm's profit-sharing plan. The plan provided that a survivor annuity would be paid to a surviving spouse or, if no such person existed, then to the decedent's parents. The plan stated it was governed by Pennsylvania law. However, the Eastern District of Pennsylvania ruled that ERISA preempted Pennsylvania law. The court held that after *Windsor*, with regard to ERISA benefits, the federal government must honor a state's recognition of a surviving spouse, and that Farley's spouse should receive the annuity.

Although this case came out in favor of the civil-union partner, a different court could rule otherwise, and couples should save themselves the potential expense and stress of a lawsuit by clearly designating beneficiaries.

In light of the discrimination same-sex couples potentially face and the uncertainty of the law around same-sex unions, couples should use estate planning documents to protect their rights. If calamity befalls the most important person in someone's life, the last thing he or she will want to worry about is the legal ramifications. With an advance health-care directive, power of attorney, will and beneficiary designations, same-sex couples can prepare for life's uncertainties.■