

## New Laws of Marriage Life Planning Are Crucial for Non-traditional Couples

By Julie A. Dialessi-Lafley, Esq.

### FAST FACTS

- Same sex couples should plan cautiously and be aware of the options available to them to protect themselves and their loved ones in the event of unforeseen circumstances.
- The only way to predetermine the disposition of assets of a couple who marries is through the execution of an antenuptial agreement, also known as a prenuptial agreement, which is used for premarital planning.
- Regardless of whether or not a couple desires to enter into an antenuptial agreement, all couples should prepare appropriate estate plans, which should include at a minimum a Will, health care proxy, durable power of attorney, and a declaration of homestead if they own real estate.

On November 18, 2003, the Massachusetts Supreme Judicial Court ruled that gay and lesbian couples have the right to civil marriage in Massachusetts. The ruling in *Goodridge v. Department of Public Health* is the first of its kind in this country by a state high court. The current approach by the Court has prompted much discussion in the legal community as to the effects a same sex marriage would have on children, assets, and liabilities of the couple.

To allow the Legislature "to take such action as it may deem appropriate in light of (its) opinion," the Court stayed the entry of its judgment for 180 days. Thus, the Legislature has been afforded time to conform the marriage laws of the Commonwealth to the Court's opinion. Some practitioners would argue that unless otherwise suggested by the context of the law, gender-specific laws

are to be interpreted neutrally; therefore, the legislature need not take any action to effectuate the Court's decision but that may be a risky interpretation for same sex couples to accept.

So how do same sex couples protect themselves, their loved ones, and accomplish their asset protection and estate planning goals? Couples should become aware of the options available to them to protect themselves and their loved ones in the event of unforeseen events. All couples, for example, should consider how to protect the assets that they bring to the marriage and how to prevent these assets from becoming marital property if that is what is desired. Couples must be aware that upon marriage all assets become assets of the couple unless there is a written mutual agreement to the contrary; thus, the distribution of marital property would be decided by the Commonwealth's general laws in case of divorce or death.

The only way to predetermine the disposition of assets of a couple who is to marry, is through the execution of an antenuptial agreement, also known as a prenuptial agreement. This agreement is used for premarital planning. It is a contract drafted to determine the ownership of property of individuals prior to marriage and to insulate the premarital property from the spouse upon marriage.

Couples who execute antenuptial agreements should be certain to prepare their estate planning documents in a manner that is consistent with the terms of the antenuptial agreements. Regardless of whether or not a couple desires to enter into an antenuptial agreement, all couples should prepare appropriate

estate plans, which include at a minimum a Will, health care proxy, durable power of attorney, and a declaration of homestead if they own real estate.

The Will directs the disposition of a person's probate estate, which consists of property that is held in one's name alone and that does not have a beneficiary designation. Joint ownership by couples is not enough asset planning to avoid probate and to keep one from needing a Will. To avoid probate and for the property to pass to the surviving joint owner, there must actually be a surviving joint owner. Upon the death of the first partner, the survivor inherits the property outside the Will. However, what happens upon the death of the surviving partner or in the event of a simultaneous death? Without the existence of a Will to address these issues, property passes as

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directed by the Commonwealth rather than as directed by the owner of the property. A Will allows the designation of a guardian of minor children, the selection of an executor or executrix to oversee the estate, and deters claims of family members and others in contest to the asset distribution.

A health care proxy is a document in which one designates someone to make health care decisions in the event one is incapacitated. A durable power of attorney is a document in which one designates someone to make financial deci-

sions. Without a health care proxy and a durable power of attorney, marriage alone will not be enough to confer the health care decision-making power and financial decision-making power upon one's partner and will likely result in the need for a Guardian to be appointed.

The homestead declaration is a document in which one declares real estate as the primary principal residence. In addition, when this property is recorded in the Registry of Deeds, the homestead declaration protects the equity of the home from creditors or judgments that

arise after the declaration was recorded up to \$500,000.

In addition to the tools described here, there are many other tools that same sex couples who marry or decide to remain as life partners may use to protect their assets and plan their estate. Cohabitation Agreements, Funeral Arrangements, Business Agreements (i.e., Buy-sell and Cross Redemption Agreements) can be used to protect one's self, one's partner, and to accomplish one's lifetime planning goals. ■

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