

ESTATE PLANNING FOR DOMESTIC PARTNERS

By Marjorie A. Guymon

Domestic Partners is now a defined term under our state statutes. Specifically, in 2009 the Nevada legislature passed NRS 122A, the Nevada Domestic Partnership Act, which provides for many of the same rights and obligations as held by traditional married spouses, including health insurance benefits, community property rights, child support and alimony.¹ The Nevada

¹NRS 122A.100 Registration: Procedure; fees; eligibility; issuance of certificate.

1. A valid domestic partnership is registered in the State of Nevada when two persons who satisfy the requirements of subsection 2:

(a) File with the Office of the Secretary of State, on a form prescribed by the Secretary of State, a signed and notarized statement declaring that both persons:

(1) Have chosen to share one another's lives in an intimate and committed relationship of mutual caring; and

(2) Desire of their own free will to enter into a domestic partnership; and

(b) Pay to the Office of the Secretary of State a reasonable filing fee established by the Secretary of State, which filing fee must not exceed the total of an amount set by the Secretary of State to estimate:

(1) The cost incurred by the Secretary of State to issue the Certificate described in subsection 3; and

(2) Any other associated administrative costs incurred by the Secretary of State.

The Office of the Secretary of State shall account for the fees received pursuant to paragraph (b) separately, and use those fees, and any interest and income earned on those fees, solely to pay for expenses related to administering the registration of domestic partnerships pursuant to this chapter, including, without limitation, the cost of materials and technology necessary to process and record the filing. At the end of each fiscal year, the Secretary of State shall reconcile the amount of the fees received pursuant to paragraph (b) and the expenses related to administering the registration of domestic partnerships pursuant to this chapter and deposit any excess fees received with the State Treasurer for credit to the State General Fund.

2. To be eligible to register pursuant to subsection 1, two persons desiring to enter into a domestic partnership must furnish proof satisfactory to the Office of the Secretary of State that:

(a) Both persons have a common residence;

(b) Except as otherwise provided in NRS 122A.500, neither person is married or a member of another domestic partnership;

(c) The two persons are not related by blood in a way that would prevent them from being married to each other in this State;

(d) Both persons are at least 18 years of age; and

(e) Both persons are competent to consent to the domestic partnership.

3. The Office of the Secretary of State shall issue a Certificate of Registered Domestic

Domestic Partnership Act allows any two persons, same sex or otherwise, to formalize their committed relationship without a marriage license. It requires that the couple register their relationship with the Secretary of State on the form provided. However, despite formalizing a couple's status as a Nevada Domestic Partnership, health and inheritance mechanisms do not automatically become available as for a traditional married couple. This article will identify the estate planning issues present when a Nevada Domestic Partnership exists and make suggestions as to how to anticipate and address these issues.

INTRODUCTION

As with any couple, same sex or not, there is a general desire to anticipate and provide for one's partner and children in the event of a serious medical emergency or death. Estate planning provides for these contingencies in advance of their occurrence, either through power of attorney for health care, powers of attorney for finances, or a living will. These legal documents are only effective while the declarant (maker) is alive.² As such, there are additional legal documents available such as a pour over will and trust to provide for loved ones upon the grantor's death. Many Domestic Partners or same sex couples do not realize that without powers of attorney they may not be allowed to make medical decisions for their partner, may not be viewed as family to gain access to their partner while hospitalized, have no say in the funeral arrangements, burial or cremation should their partner pass away, or have any inheritance rights upon their partner's death.

Most couples will benefit from an estate plan, which consists of wills, trust, powers of attorney, and living will (declaration). These estate planning documents assist a couple in avoiding guardianship or probate, which can be costly and time consuming. Without powers of attorney, a disabled individual cannot manage their affairs and needs someone to assist them in that task. A legal guardianship is required unless the disabled individual had the foresight to provide powers of attorney to become effective upon said disability. These allow the disabled

Partnership to persons who satisfy the applicable requirements of this section.

4. As used in this section:

(a) "Common residence" means a residence shared by both domestic partners on at least a part-time basis, irrespective of whether:

(1) Ownership of the residence or the right to occupy the residence is in the name of only one of the domestic partners; and

(2) One or both of the domestic partners owns or occupies an additional residence.

(b) "Residence" means any house, room, apartment, tenement or other building, vehicle, vehicle trailer, semitrailer, house trailer or boat designed or intended for occupancy as a residence.

²NRS 162A.270(1)(a) and .820(1)(a)

individual to choose who they would like to manage their legal and physical affairs in the event they are unable to do so. Likewise, without a will in Nevada, a decedent's estate will be distributed according to our state statute which directs that one half the decedent's estate goes to the surviving spouse (if legally married), and the balance is divided equally between any surviving children, and if no children then to parents, then siblings, then cousins, and so on out to extended family. If there is no next of kin, then a decedent's estate can escheat to the state of Nevada, meaning the state of Nevada will receive the assets. Most individuals would rather assure that their assets are left to the person(s) whom they direct rather than those required by law or the state of Nevada.

DISCUSSION

A. Powers of Attorney and Living Wills (Declaration)

A brief explanation of what these estate planning mechanisms are is in order, after which a more in depth discussion of their necessity in Domestic Partnerships will follow.

1. Durable Power of Attorney for Health Care Decisions

This instrument allows you to designate a primary person and two alternate people to act as your attorney-in-fact (decision-maker) to make health care decisions for you in the event you are incapable of giving an informed consent regarding your health care. The alternate persons would act as attorney-in-fact only if the primary (and first alternate) could not act for any reason. This document provides specific instructions to your attorney-in-fact regarding certain desires you may have in respect to potential health care decisions. You may want to provide your physician with the copy of the Durable Power of Attorney for Health Care Decisions so that it becomes part of your medical record.

A Durable Power of Attorney for Health Care Decisions must comply with the statutory form found in NRS 162A.860.

Without a Durable Power of Attorney for Health Care Decisions a person's Domestic Partner may not be allowed to make decisions that a legally married spouse could make in a similar circumstance. Of course, in many cases, such as the decision to refuse life support, even a spouse may be required to obtain a court order allowing the same unless a Durable Power of Attorney for Health Care Decisions and a Living Will (see discussion below) have been provided. Equally distressing is the reality that many health providers refuse to allow anyone but immediate family and those holding a Durable Power of Attorney for Health Care Decisions access to the patient. Seeking a court order to allow access may be time consuming and costly. Better to have anticipated the situation and have a Durable Power of Attorney for Health Care Decisions in hand for your Domestic Partner to avoid these type situations.

2. Durable Power of Attorney for Financial Decisions

The Durable Power of Attorney for Financial Decisions allows the nominated attorney-in-fact (generally some individual that you trust) to act on your behalf regarding financial matters, such as accessing bank accounts, paying bills, and conducting business while the disabled person is unable to do so. It also assists in the event a trust was created but certain assets were not yet conveyed into the trust. For example, the Employee Retirement Income Security Act of 1974 (ERISA) generally provides for an anti-alienation of any retirement benefits to a Living Trust. This means that any retirement plan which is governed by ERISA cannot be legally titled in any other name except that of the individual owner. Consequently, it is always necessary to designate the Living Trust as the beneficiary of any assets governed by ERISA, however, it is impossible to legally transfer title to the Trust. The practical effect of this restriction is that the Trustee may not make any decisions regarding any assets governed by ERISA. By drafting the Durable Power of Attorney, the attorney-in-fact may make decisions for your's assets governed by ERISA, if any such assets exist. This can provide, under certain circumstances, substantial income tax, estate tax and excise tax savings.

A Durable Power of Attorney for Financial Decisions must comply with the form provided in NRS 162A.620.

Without a Durable Power of Attorney for Financial Decisions a Domestic Partner may be unable to access financial records, bank accounts, or otherwise conduct business such as the sale or purchase of assets pending when the disabled person was affected. As in the discussion pertaining to Durable Power of Attorney for Health Care Decisions the only way to obtain authority to act on behalf of the disabled partner is through a guardianship proceeding which could take weeks to obtain and would require incurring attorney's fees and costs.

It is important to note that powers of attorney do not have any power upon death; rather, all powers are during one's incapacity only. NRS 162A.270(1)(a) and .820(1)(a)

3. Living Will (Declaration)

The Declaration is Nevada's Living Will, an instrument that provides your consent that life-sustaining procedures be withheld or withdrawn in the event of a terminal condition where death is imminent and allowing natural death. The Declaration should be provided to your physician so that it becomes part of your medical history. It should comply with the format provided by statute in NRS 449.610.

As discussed in the Durable Power of Attorney for Health Care Decisions section, without a Living Will your Domestic Partner may have difficulty under the Durable Power of Attorney for Health Care Decisions in effectuating your desires with regard to life-sustaining procedures and possible costly court intervention may be required. In many cases, what your Domestic Partner wants and what their family members want may conflict and the Domestic Partner may not want to do battle with the family in this regard. A Living Will avoids this scenario altogether. In a Living Will a Domestic Partner may designate cremation or burial

requests and to whom the body of the decedent is to be released. This avoids family battles over these issues

B. Pour Over Wills and Trust

The Pour-Over Will operates similar to any other Last Will and Testament with the exception that all assets generally are to be distributed to the Trustee of the Trust. As a result, the Will becomes designated as a "pour-over" will, because all assets not held in the trust at the date of your death will be "poured-over" and placed in the Trust via the Last Will and Testament. This is helpful where the grantor may forget to fund the asset into the Trust prior to passing. A Last Will and Testament does not avoid probate where a Pour-Over Will with a Living Trust is intended to do so.

Regardless whether a Living Trust with a Pour-Over Will or a simple Last Will and Testament is chosen as the estate planning tool, one or the other will assist the surviving Domestic Partner in asserting their rights with regard to inheritance where the laws of the state may not. In the will specific beneficiaries are named thus severely limiting any chance of a contest as to whom is entitled to the assets of the deceased. Again, under Nevada law where there is no will, a person's legal spouse is entitled to all of the decedent's assets unless there are surviving children, parents or siblings, in which case the surviving spouse shares with the surviving family of decedent. If no surviving spouse then the decedent's assets are disbursed to the surviving family of decedent. NRS 134.040 through .060. There is no provision for Domestic Partners in Nevada's inheritance statutes. Rather, if there are no relatives of the decedent then the state of Nevada obtains the assets under NRS 134.120.

A Living Trust is a legal document prepared by an attorney. The trust agreement clearly states the terms under which your assets and debts are handled in the event of your death. By creating a valid trust agreement the need for a probate proceeding is avoided. Within the trust beneficiaries are identified and a trusted individual or entity is appointed by you through the trust to administer the assets for their benefit. The trust document is private. The trust allows the grantor (creator) to control their assets and debts as they deem appropriate, through their successor trustee, beyond the grave. This is because after the grantor's death, the trust continues on as set forth in the agreement. A Living Trust is a necessity for most Domestic Partnerships where there are assets of the partnership or assets of one of the partners which the intent is to go to the other partner.

Many people who enter into a Domestic Partnership will eventually move from the state in which they created their Domestic Partnership to a state where there are no Domestic Partnership laws in place. At the present time there are only five states and the District of Columbia recognizing same sex marriage and only the state of California recognizes some same-

sex marriages celebrated within its borders.³ Seven states recognize spousal equivalency.⁴ Creating a Living Trust protects against such events by assuring that the partners will inherit and control the Domestic Partnership assets regardless of in what state they reside, and regardless of whether said state allows Domestic Partnership marriages, Domestic Partnerships, or nothing at all.

Also of note is the ability in a Will to designate guardians over minor children in the Domestic Partnership. In legally married relationships, when a couple has a child they are both presumed to be the legal parents of the child. However, a non birth or non adoptive parent's rights may not be recognized. It is important for the nonlegal parent to obtain a court order, if possible, establishing that parent's legal rights. While a Will does not provide such an order, it does state a decedent's desires as to whom they would like to be the guardian of their minor child in the event a court order establishing the surviving Domestic Partner's parental rights does not exist.

C. Tax Aspects

1. Estate Tax

When a person dies, an estate tax may be assessed on the amount of assets on hand at the time of their death. Depending on the value of the decedent's estate, it may escape taxes. Under the Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010, an estate worth \$5 million or less escapes estate taxes and an estate tax rate of 35% is set on anything over \$5 million. This Act will expire December 31, 2012. Between legal spouses, any unused portion of a deceased spouse's \$5 million exemption can be used by the surviving spouse, thus increasing the surviving spouses exemption. This is known as the marital deduction. This is not available to Domestic Partnerships. In such situations, each individual is allotted only the \$5 million exemption without any carry forward of the deceased partner's exemption to the surviving partner.

2. Gift Tax Exclusion

An individual may give a tax free gift of up to \$13,000.00 per person, with a \$1 million life-time exclusion. This rule remains static regardless of lawful marriage or Domestic Partnership status, as it enures to the individual. In Domestic Partnerships this mechanism allows up to \$1 million transfers of assets tax free between Domestic Partners, thus reducing an estate that would exceed the estate tax exemption.

³Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont.

⁴New Jersey and Hawaii (effective January 1, 2012) - civil unions; California, Oregon, Washington, Nevada and Illinois - domestic partnerships.

Suggested ways of gifting between Domestic Partners includes conveying assets into Tenants in Common, Joint Tenancy with Right of Survivorship, or Community Property with Rights of Survivorship.⁵

a) A tenant in common situation is ideal when both partners are contributing to an asset and want to maintain that proportionate share of the asset as compared to their contribution. Upon the death of one tenant in common, only the deceased partner's share of the asset is subject to estate tax. Or, if the deceased partner gifted the surviving partner's share of the asset, then it is subject to the \$1 million lifetime exclusion. Anything over the \$1 million lifetime exclusion would be taxed based upon the value of the asset not qualifying for the exclusion based upon the appraised value of the asset at the time of the gift. The deceased partner's share of the asset will be taxed or not based upon the value of the deceased partner's estate, and thereafter be transferred to the surviving partner to the extent there is a Will or Trust so providing. Keep in mind that if there is no Will or Trust providing that the surviving partner is the beneficiary of the asset, it will be transferred as outlined by state law.

b) A joint tenancy with rights of survivorship allows partners to jointly hold property, either equally or proportionately, with an automatic conveyance to the surviving joint tenant upon the death of one of the joint tenants. The primary concern with holding property as joint tenants with rights of survivorship is that upon the death of the first joint tenant, the entire value of the asset is included in the deceased partner's estate unless the surviving partner can prove contribution to the purchase of the asset. This can pose a significant use of the \$5 million tax exemption and does not take advantage of the \$1 million tax exclusion. Still, holding property in this fashion seems to be the preferred ,if not most faulty, manner of titling between Domestic Partners. Joint tenancy with rights of survivorship escape probate as there is no need for a Will to identify the successor in interest, however, the tax ramifications to using this means of transferring title should encourage Domestic Partnerships to instead utilize a Trust to both escape probate and utilize tax planning within the Trust document.

c) Community Property allows Domestic Partners to hold property as if in joint tenancy with rights of survivorship. Community property is assumed to be owned equally, regardless of who generated the asset, so long as it was generated during the community's existence. This means that both partners are equally liable for any tax consequences and should file returns in compliance with this. Agreements can be entered into that change the character of community property but must follow state law with regard to pre marital or post marital agreements, and may come with their own tax consequences. Upon death of one partner, half the community assets are valued in the decedent's estate and the other remain the assets of the surviving partner.

d) A Revocable Trust allows a domestic partner to transfer assets to the Trust, maintain control of the trust while living, and convey assets to the surviving domestic partner without any

⁵Community Property between same sex or opposite sex couples is only available in California, Washington and Nevada.

taxable gift upon death. This makes a revocable trust preferable over a joint tenancy or tenancy in common. There is no transfer tax, no gift tax, rather only the potential for estate tax should the assets exceed the exemption amount.

In some instances, it may be more beneficial for a Domestic Partnership to consist of two separate Revocable Trusts. Or, a Revocable Trust may include both Domestic Partners as grantors and grantees/beneficiaries. A joint revocable trust holds the assets of the grantor(s) and can be treated as a separate entity for tax purposes. A tax identification number is obtained for the joint trust and annual tax returns are filed. The income and expenses of the joint trust do not flow through to the individual Domestic Partners' tax returns unless the election to do so is made. One way to accommodate the lack of a marital deduction for same-sex couples (the attempt to avoid tax upon the second to die) is to create a bypass trust. This would allow the funding of a second trust within the revocable trust created at the time of the first partner to die. This second trust is funded with whatever assets are deemed appropriate to avoid estate tax. The surviving partner may retain an interest in the asset conveyed for life, with the asset then going to the bypass trust's intended beneficiaries.

Separate Revocable Trusts keep the ownership of various assets clear. A tax identification number is not necessary in that instance, since there is single ownership and any income generated will automatically flow through to the single tax payer.

e) An Irrevocable Trust allows the transfer of property from one partner to another at a gift tax savings. This is done through various different types of irrevocable trusts, namely A Qualified Personal Residence Trust (QPRT), a Grantor Retained Income Trust (GRIT), Grantor Retained Annuity Trust (GRAT), and Grantor Retained Unitrust (GRUT). The theory behind these type trusts is to convey the asset away now, with a retained benefit to the grantor for a period of years, and the value of the asset gifted to the trust set at the time of the transfer or discounted due to the future interest held.

CONCLUSION

Whether a same sex couple is a registered Domestic Partnership or not, it is imperative that they obtain powers of attorney, living wills and a trust with pour over will to avoid the pitfalls otherwise sure to occur upon physical incapacity or death. To learn more about how to obtain these legal document please contact one of our attorneys at Goldsmith & Guymon, P.C.