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Trusts & Estates

The Impact Of 'Goodridge' On Estate Planning

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Assuming gay marriages are licensed in the commonwealth (as a result of the Supreme Judicial Court's ruling in *Goodridge, et al. v. Department of Public Health*), there will be profound changes in advising gay clients on estate planning.

Prior to the *Goodridge* decision, estate planning for gay clients often focused on the importance of basic planning. As marriage was not an option, planning focused on making sure gay partners were provided for in the estate plans and were nominated to make decisions in the case of their partner's incapacity. Tax issues focused on the gift and estate tax consequences of transferring assets to a non-spouse.

However, if gay couples can marry in Massachusetts, then the landscape of estate planning issues shifts. This can be seen in several key areas.

Health Care Decision-Making

Prior to *Goodridge*, gay partners were not presumptive health care decision-makers for each other. The law provided that spouses, children, parents and other relatives all had preference in guiding decision-making for an incapacitated person.

Moreover, as a result of those presumptions, gay partners were often barred not only from a role in decision-making, but from even visiting their loved ones.

Marriage will change that issue. If gay marriages are licensed, doctors and hospitals in Massachusetts will be required to recognize the directions of gay spouses — if the relationship is solemnized in marriage — just like they need to recognize heterosexual spouses.

However, this does not negate the importance of gay couples executing proper living will and health care surrogate forms. If something should ever happen outside the boundaries of the

commonwealth, then they will need health care decision-making designations.

Moreover, the statutory presumptions favoring spouses in the selection of guardians will have to also recognize gay spouses. If a member of a married gay couple should become mentally incapacitated, then the spouse would be entitled to a preference in the appointment of a guardian.

Statutory Provisions On Death

When one spouse dies, the surviving spouse has several important rights.

First, the surviving spouse is given priority to serve as the executor of the deceased spouse's estate. This is an important and meaningful role. Having a preference ensures that the survivor and not a family member of the deceased spouse manages the couple's affairs.

Second, if a spouse dies without a will, then the surviving spouse is entitled to a share of the deceased spouse's estate — via the statutory rules of intestate succession. The portion of the estate passing to the surviving spouse via intestacy differs depending upon whether there are children or not. However, without being married, gay survivors were not entitled to any intestate share. This is a significant new property right for gay couples who marry.

Third, if a spouse dies with a will, but without providing for the survivor, then the surviving spouse will be entitled to an elective share of the estate of the first spouse to die. If gay couples can marry, then the elective share statute will apply. Again, this is a valuable property right that did not accrue to unmarried gay couples. Moreover, it impacts planning for gay couples in a new way.

Before *Goodridge*, when representing a gay couple, no matter how much or how little they wanted to leave one another, there was no concern for elective share rights. Now, that property right must be addressed.

Moreover, the existence of the elective share right (coupled with rights upon divorce) will almost assuredly lead to a new level of business in creating antenuptial agreements for gay couples. Since their property rights will be altered by marriage (in a way they were never before), it seems certain some gay clients will now want to alter the statutory rules for property rights on divorce and death. Thus, antenuptial agreements will become an important planning step.

Tax Planning

The realm of tax planning offers additional and perplexing changes in estate planning for gay couples. In general, the issues relate to the Federal Defense of Marriage Act of 1996 (DOMA), which states in part:

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife. Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996) codified at 1 U.S.C. Sect. 7 (1997)."

When advising gay married couples on estate planning, this dichotomy between state tax treatment (recognizing the couple as married) and federal tax treatment (not recognizing the couple as married) is the central issue.

Some clients may be interested in challenging the constitutionality of the DOMA (indeed, it seems likely a couple or a class will challenge it under the Equal Protection Clause), so it may be worth advising clients that suit is a possibility.

For clients not interested in challenging the law but looking for advice on planning assuming DOMA applies, there are some fundamental issues to consider.

First, a joint Massachusetts income tax return could be filed. However, a joint federal income tax return (Form 1040) would be barred by DOMA. So, it appears two individual federal returns must be filed. But a federal credit is offered for state taxes paid. For two individuals filing individual Massachusetts and federal returns, the application of the state credit is easy enough to calculate; and for a married couple filing joint Massachusetts and federal returns, that's also easy enough to calculate.

But how will the credit be handled in a situation with a joint Massachusetts tax return and then two federal income tax returns? Should the couple equally split the state tax credit or apportion it based on contribution? Apportionment is probably the fairest approach, but there does not appear to be any law that clearly says what is the right thing to do.

Second, there will be interesting planning issues regarding state and federal transfer taxes. We can assume that an unlimited marital deduction will be permitted under the Massachusetts transfer tax system — for both gay and heterosexual married couples. But again due to DOMA, the federal transfer tax system is not obligated to provide a marital deduction to gay couples. This divergent treatment will impact transfer tax planning.

Gift Tax

One problem will be the gift tax. As Massachusetts does not tax lifetime transfers, transfers between gay spouses in Massachusetts will not trigger a Massachusetts gift tax obligation, but may trigger federal gift tax treatment.

In other words, completed gifts between gay spouses in Massachusetts will be tax free, but under federal law, transfers in excess of $11,000 per year will trigger federal gift taxes and the obligation to file a federal return (Form 709).

The gift tax rules will create significant problems for married gay couples that they do not create for married heterosexual couples. Indeed, the gift tax problems for gay couples will essentially be identical to the problems faced now without marriage — transfers of assets between the couple (or mixing of investments) will lead to taxable gifts (federally, at least).

On the one hand, Massachusetts state laws will be changing to encourage gay couples to share assets (will allow them to create tenancies by the entireties, and will facilitate interspousal gifting and spending). On the other hand, the federal gift tax rules will burden those types of asset-sharing arrangements by taxing transfers in excess of $11,000.

Estate Tax System

A second problem will be the estate tax system. Planning for a married couple often involves utilizing the marital deduction to avoid tax on the death of the first spouse. That planning will not be available to a gay married couple, again due to the Defense of Marriage Act of 1996. While an unlimited state marital deduction would be available, the lack of a federal marital deduction severely limits the kinds of planning that can be done.

Indeed, the interaction (or lack thereof) of the estate tax laws will be a constant friction for estate planning. Standard marital deduction planning (and any language for credit shelter and marital trusts) will not work in the case of gay married couples.

Like the gift tax laws, essentially the marriage of a gay couple will not impact the estate tax treatment of transfers between them (on death), except under state law. And again, as the state estate tax is a much smaller amount than the federal tax, all planning will have to focus on the federal rules.

Thus, the state marital exemption (from gift and estate tax) will be an illusive benefit.

Conclusion

In the end, the *Goodridge* decision significantly impacts estate planning for gay couples that choose to marry in the commonwealth. And all gay couples that marry will need to have their existing estate plans redone.

However, some of the essential estate planning opportunities — the favorable tax treatment usually afforded married couples — will not be available to gay married couples.

Planners will instead need to draft estate plans that consider the unique estate tax implications of their situation and also advise gay couples of all the myriad complications of the gift tax consequences of transferring or commingling assets.

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