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SAME-SEX PLANNING: Civil marriage doesn't mean estate issues are any simpler. (Right) **40**

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Goodridge ruling doesn't simplify estate planning

The Supreme Judicial Court's 2003 Goodridge decision granted same-sex couples in Massachusetts the benefits of civil marriage. But even with this landmark, controversial ruling, estate planning still remains a potentially daunting task for same-sex couples, married or not. Lisa Cukier, a partner at Burns & Levinson LLP who specializes in planning issues for same-sex couples, recently spoke to the Boston Business Journal's Chris Mahoney about the estate-planning issues these couples face.

Same-sex couples can marry in Massachusetts. Why would they have singular estate-planning issues?

It's very different for same-sex couples. There is a federal law called the Defense of Marriage Act, by which the federal government doesn't recognize same-sex marriage. It perceives a couple who are a gay couple as being single and denies the protections and benefits otherwise available to a married couple. In addition, 39 states in this country have what are called mini-DOMAs.

What are some of the problems DOMAs and mini-DOMAs cause?

A couple could be married in Massachusetts, could travel to another state perhaps for a job relocation, a vacation or to visit family, and the other state might not recognize the marriage. This could cause major problems in certain circumstances.

For instance, I have a client who went on vacation to the Caribbean. One of the partners had an accident on a boat and ended up in the hospital, and the hospital would not recognize the other partner as her spouse and would not allow her to be at the bedside with her ill partner. Ultimately, she called us and asked us to fax her their health care proxy, but by then it was too late, the partner had died. Now, there's no guarantee an out-of-state hospital would recognize a health care proxy for a same-sex couple, but at least it begins



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Burns & Levinson partner Lisa Cukier specializes in estate planning for same-sex couples.

to proximate some of the protections that different-sex couples have when they travel out of state.

You may have heard the term that marriages are given full faith and credit when the partners travel out of state, so a different-sex couple that got married in Massachusetts, their marriage is recognized in every other state. Marriages of same-sex couples are not given full faith and credit in certain other states because of state DOMAs.

And how about issues related to estate planning?

State law determines how our assets pass on after our death. When you are in a state other than Massachusetts, if there is no will or trust that directs the disposition of assets, then the state would require the assets pass according to intestacy laws, which provide that family members in order of priority are entitled to receive assets. Ordinar-

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ily the priority goes to spouses, but in states that deny the existence of same-sex marriage, the same-sex spouse will be ignored, and the assets would then pass on to children, then up again to parents and then out to siblings.

So a same-sex spouse whose partner dies outside Massachusetts can be entirely and thoroughly disregarded from disposition of assets even if they've been married 30, 40 or 50 years. So it is imperative that couples do estate planning while they are in Massachusetts — and right after they get married, so they can ensure their will can take effect right after the death of either spouse.

Has Goodridge led to any confusion among your same-sex clients?

People don't realize that same-sex marriage is tenuous. Only Massachusetts recognizes it; the federal government will not. A lot of times, individuals in the gay and lesbian community don't realize they need certain lawyers who are familiar with different types of trust vehicles to take advantage of different tax treatments. It's important that the lawyer is very familiar with the different types of trust used to equalize the playing field, because Goodridge alone won't do it.

Did Goodridge make any aspect of estate planning easier?

It's not really easier because it's more expensive, any way you do it. (Estate plans for couples can cost \$7,500 or more.) The types of estate planning that have to be undertaken are more expensive because it requires planning for different tax disadvantages and different tax advantages. Are there benefits to estate planning for same-sex couples? There are some discreet benefits. Since the federal government denies the existence of same-sex marriage, there are some instances where partners who are seen as unmarried partners can transfer interests in limited liability corporations. Another small, discreet advantage for same-sex couples whose marriages are not recognized is that these couples can take advantage of certain capital gains exclusions. But in order to make these benefits work, it requires going to a

lawyer who is familiar with these issues, and ultimately, the value you might gain might be potentially outweighed by the cost.

How long is the process?

To a lawyer who understands the issues, the work has already been done. There have been approximately 8,000 couples who have gotten married in Massachusetts, and there are only a handful of lawyers who understand the issues. So those lawyers who handle this area are so familiar with the issues, we've already devised formulas for prenuptial agreements and for trusts. We not only assist people in their prenuptial agreements but also in their divorces. If a marriage is not recognized on a federal level, then alimony and transfers of assets might also be treated differently on a federal level.

If you go to a lawyer who is familiar with this, it's been done so many times already that the time to prepare a rock-solid plan is no different for same sex couples than for a different-sex couple. If someone goes to an attorney who doesn't understand the impact of DOMA on same-sex marriage, then that lawyer would have to re-create the wheel, and there are so many traps for the unwary, so that can be tricky and that can be time-consuming.

It almost sounds like Goodridge changed very little.

There is a major change. There is an intangible benefit to same-sex marriage: the common ground of the shorthand terminology of marriage itself. When our clients are out in the world with their families and their friends, the ability to use the word "marriage," and to refer to a family that is together as a result of marriage, is a benefit that is priceless. You can't duplicate that. And it is a benefit that spreads very quickly. It adds so much acceptance to the lesbian and gay community to be able to take part in one of the universe's most important cultures, which is the culture of establishing a marriage — your devotion and loyalty to one person. My hope is that in future, we can stop saying "same-sex marriage" and we can stop saying "Massachusetts marriage" to denote a creature that is a subset of a marriage that we have all come to know.