

Elder Law Guys: New estate planning issues emerging since the arrival of same-sex marriage in Pennsylvania

September 27, 2015 12:00 AM

By Julian Gray and Frank Petrich

Comprehensive estate planning is challenging. In creating a plan, we must review multiple issues such as federal and state taxes, family dynamics, health concerns, business interests and ultimately the goals of the client.

Estate planning for same-sex couples has additional factors to consider. Usually, these factors were concentrated on issues affected by the government's non-recognition of the marriage such as taxes and federal benefits. Much of that has changed now as a result of the following court decisions.

Pennsylvania has permitted same-sex marriage since the *Whitewood v. Wolf* decision issued on May 20, 2014. At the federal level, the U.S. Supreme Court decided *Obergefell v. Hodges* on June 26, 2015, which requires all states to permit same-sex marriages as well as recognize those validly performed in other jurisdictions.

On the surface, the initial legal barriers to same-sex marriage are now gone. However, consider some new issues that either present new planning issues or will need further clarification by legislation or court action.

1. Custody: The doctrine of presumption of paternity requires courts to presume that children born during a marriage are the children of the parties to the marriage. Arguably, this doctrine, as well as similar types of doctrines, should apply equally to same-sex marriages and parents as they apply to opposite-sex parents and marriages.

Since it may take the courts some time to figure this out, same-sex couples planning to have children during the marriage should consider formally going through the adoption process.

2. Defining length of marriage: Whether calculating federal benefits or determining equitable distribution and alimony in divorce, determining the length of the marriage for people who were "committed" to each other for many years but were only recently allowed to become legally married will be a challenge.

For example, Social Security requires a 10-year marriage to collect on the other spouse's earnings record. How is this treated for a same-sex couple who could not "marry" until now but has acted as a "marital unit" for all intents and purposes for over a decade?

Similarly, if the same-sex couple gets divorced in the future, how far back will the courts look to determine the marital assets? Likewise, spousal support and alimony for the dependent spouse may be severely reduced if the court fails to

take into consideration the substantial contributions to the marriage for several years prior to the legalization of the union.

3. Real Estate: Prior to the above referenced court decisions, same-sex couples could not take title to real estate as “tenants by the entireties,” which is a type of ownership that affords special protections against creditors and eases post-death transfer of the real estate title and tax issues.

This problem can be fixed now that the law is changed. A same-sex couple should consider discussing a deed revision with their attorney to re-title the real estate as tenants by the entireties.

We consulted with local family law expert Kenneth Horoho Jr. on these emerging issues. He noted, “Many of these financial (transfer of property, taxes, alimony, equitable distribution) issues can and should be addressed and resolved in advance of marriage in a premarital agreement or after nuptials in a post-marital agreement.”

Furthermore, he added, “These types of agreements have taken on added significance with heterosexual couples and should be considered by same-sex couples to avoid the uncertainty that the law, in its infancy stage, currently provides.”

In summary, while the nation has taken a progressive step forward this year in relation to same-sex marriages, there are many new issues created by this change that remain to be decided. There are some proactive measures that same-sex couples can take to address these issues.

Julian Gray and Frank Petrich are both certified elder law attorneys who practice in the Pittsburgh area at Gray Elder Law. Send questions to elderlawguys@grayelderlaw.com or visit www.grayelderlaw.com