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ESTATE PLANNING FOR UNMARRIED COUPLES

By Spencer M. Baxter

In my experience working with clients over the years, it seems that people generally fall into two categories; they do not have a formalized estate plan, or their current plan is woefully inadequate. This is especially true with unmarried couples. For the context of this discussion, the term "unmarried couples" is intended to include both unmarried heterosexual and homosexual couples.

In recent years, various states have legalized and now recognize same-sex marriages. Since the legality of same-sex marriages is such a rapidly changing and volatile area of the law; solely relying on the default laws is a fools errand. Similarly, a limited number of states recognize Common Law Marriages (not Virginia), which allows for an unmarried heterosexual couple to be considered married (without the formalization of a ceremony and license). If the couple moves outside the state that recognizes their marriage, they may not have the legal authority to make financial or health care decisions for each other. The best solution is to memorialize financial and health care wishes in a proper estate plan.

Health Care Decisions

Presuming that not all states will recognize the relationship between unmarried couples, health care decision authority needs to be granted to specific people, typically the partner, in a legally recognized format. This is accomplished by creating a health care power of attorney which lists those persons authorized to make health care decisions. In Virginia, if there is no health care power of attorney in place, Code § 54.1-2986 authorizes health care decisions by the spouse first (if marriage is recognized), and then down the list to children and other blood relatives. Without a valid health care power of attorney, a family member may be able to make decisions without the partner's input, and even have them removed from the hospital room.

A living will should also be in place so there is no dispute at the time someone needs to be taken off life support. The living will should reference back to the agents identified in the health care power of attorney and authorize them to ensure the enumerated wishes regarding life support are followed.

Financial Decisions

Without being granted a recognized financial authority, someone cannot automatically make financial decisions on behalf of an incapacitated person, regardless of the relationship. The granting of financial authority can be accomplished in two ways: either through a durable power of attorney, or through a Revocable Living Trust.

A power of attorney will appoint an agent (typically a partner or spouse) to make financial decisions upon the inability of the creator. These documents work in many cases, but the inherent enemy to powers of attorney is time. Financial institutions will usually not accept a power of attorney older than five years, so a good rule of thumb is to update it every couple of years. If a power of attorney is too old, or is not in existence, the only option available to the partner is to start a court guardianship/conservatorship proceeding. Guardianship/conservatorship cases should always be looked upon as an action of last resort. They should be avoided at all cost because a court may appoint a family member as Guardian/Conservator rather than the partner of the incapacitated person.

The most viable option is to create a Revocable Living Trust that names the partner and other alternates to make financial decisions on the behalf of the partner. The benefit of a Trust is that it typically do not have the short shelf life that powers of attorney are subject to, thus it is more likely to avoid Guardianship/Conservatorship cases.

Passing of Assets

If a couple is unmarried, and a partner dies, the state laws of intestacy will control the distribution of the estate. The laws of intestacy divide assets among children or other blood descendants, rather than the surviving partner. The most straightforward approach to distributing assets according to the deceased partner's wishes is to create a Will. Unfortunately Probate is required for the distribution and division of assets for both Wills and the laws of intestacy. Probate may be problematic for unmarried couples because heirs may contest the disposition of assets.

The best estate planning option for unmarried couples is to use a Revocable Living Trust. A Trust can dictate how assets are divided, control how assets are used, it avoids probate, and it is incredibly difficult to challenge the terms of the trust.

Conclusion

There are numerous variations in estate planning that are available to unmarried couples and which one is right is a completely personal decision. As with many things, a little bit of preplanning now can save a great deal of expense and heartache, and at the same time ensure your wishes are carried out. The attorneys at Johnson, Gasink & Baxter, LLP are always happy to talk with their existing clients and meet with perspective clients. We can review existing plans or create new personalized estate plans that are a custom fit to the goals and objectives of our clients.

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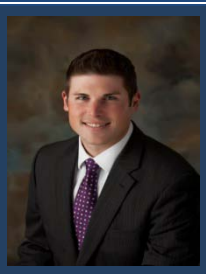

About the Author:

Spencer Baxter is an experienced problem solver who helps individuals and businesses achieve and protect their goals of prosperity, stability and growth through appropriate planning. Spencer takes great pride in making sure that his work for clients is always reliable, correct, and on time.

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