NEW JERSEY ESTATE PLANNING ISSUES AND TECHNIQUES AFFECTING CIVIL UNION COUPLES

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Four years before New Jersey passed the Domestic Partnership Act (DPA)[1] and seven years before passage of the New Jersey Civil Union Act[2], the 2000 Federal Census reported the number of New Jersey households with unmarried cohabitants at 124,457.[3] Though the census did not specifically address the number of same-gender couples,[4] the number of households occupied by same-gender individuals was placed at 18,228. Regardless of the actual number, by the time the 2010 Census is completed at the end of next year, the number of same-gender couples residing in New Jersey is expected to rise dramatically.

The increase in same-gender couples[5] has led to an increase in demand for practitioners who are familiar with the issues facing this new clientele. Same-gender couples, like any other couple, have similar fears, concerns, anxieties, and require many of the same legal services as traditionally provided to married couples.

This article attempts to draw attention to many of the issues to which estate planning attorneys must focus when representing same-gender couples. Although the law in this area is relatively new, with a little bit of effort, this author believes any attorney can begin to understand and plan for the challenges facing same-gender couples.

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[1] P.L. 2003, c.246 (N.J.S.A. 26:8A-1 et seq.) as amended.
[2] P.L. 2006, c.103 (N.J.S.A. 37:1-30 et seq.)
[3] http://factfinder.census.gov (accessed October 22, 2009)
[4] In 2000, DOMA concerns prevented the Census from asking whether same-gender individuals were either married or in a legally recognized relationship. The 2010 Census will ask this question.
[5] For purposes of this article, "same-gender couples" refers to both unionized and non-unionized couples under the Civil Union Act (as well as Domestic Partnerships before the law was amended). When such distinction is relevant (*e.g.* as it is for certain estate planning concerns), the legal status of the relationship will be stated.

I. CIVIL UNION FORMATION

The Civil Union Act (the "Act") affords same-gender couples rights under New Jersey Law previously enjoyed by married couples. The Act went into effect February 19, 2007 and the first civil union licenses were issued at that time. The Act only applies to those individuals who have entered into a civil union in accordance with its terms; unmarried cohabiting couples are offered no benefits or legal recognition.

The requirements for entering into a civil union are identical to the requirements for entering into a marriage. The couple must first go together to their local licensing officer and apply for a license. As with marriage licenses, there is a 72 hour waiting period before the license is issued. Once issued, the couple has 30 days to have their union solemnized. (Any public officer authorized to perform marriage ceremonies must also perform civil union ceremonies.) Non-resident couples may also apply for a license, which must be obtained from the municipality in which the ceremony is to be performed.

For couples who entered into a civil union or domestic partnership or same-gender marriage out of state, their relationship will be recognized under New Jersey law as a civil union if the law of the foreign jurisdiction closely resembles New Jersey law. For example, couples from Massachusetts, Vermont, New Hampshire, Connecticut, California, and Oregon, as well as Canada, would be treated as having entered into a civil union under New Jersey law.

II. JOINT REPRESENTATION OF SAME-GENDER COUPLES

The first major issue in representing a same-gender couple is whether the attorney can represent both parties.

New Jersey rules of professional conduct state a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest".[6] However, an attorney may represent a client, notwithstanding a concurrent conflict of interest, if the following conditions are met:

> (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, […].;
>
> (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

[6] NJ RPC 1.7 (effective September 10, 1984; as amended November 17, 2003, such amendments effective January 1, 2004).

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.[7]

In addition, the rules of professional conduct state that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation".[8]

A. Civil Union Couples

For married couples as well as civil union couples, an attorney should draft an identical letter addressed to both parties disclosing the issues of joint representation. The letter must be signed by both spouses before the attorney should agree to the joint representation.

B. Non-Unionized[9] Couples

In the case of unmarried cohabitants (same-gender or otherwise), the law treats such individuals as little more than interested unrelated parties offering no benefits or legal recognition.

As is often the case when planning for a same-gender couple, the couple frequently seeks representation before either undergoing or considering a civil union. The attorney must be mindful in disclosing, both verbally and in writing, the effect of joint representation. While joint representation is, in many cases, appropriate, the attorney should advise the couple to retain separate counsel when clear conflicts exist.

The attorney should prepare a separate letter for each party disclosing the issues of joint representation in situations where the couple is neither married nor unionized. While certainly a judgment call, if full disclosure is made and waivers are signed, attorneys can proceed to represent both parties.

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[7] Id.
[8] NJ RPC 1.6 (effective September 10, 1984; as amended November 17, 2003, such amendments effective January 1, 2004).
[9] For lack of a better word, "unionized" throughout this article refers to a couple that has entered into a Civil Union—membership in a recognized labor union notwithstanding.

III. PRE-NUPTIAL AGREEMENTS

As for married couples, New Jersey allows same-gender couples the right to enter into and modify the terms of their civil union.[10] Each must undertake a complete review of the other's finances and attach a schedule of such disclosure to the agreement. To accomplish this task, both parties must have separate counsel. Since these agreements are held to the same standards as pre-nuptial agreements for married couples, less formal agreements may be defeated on grounds of being inequitable. Attorneys must apply the same process as they would for any other couple. After the agreement is signed, a single attorney can provide estate planning advice to both parties (assuming proper disclosures and waivers are made).

IV. WILL DRAFTING

The practitioner must consider several factors before deciding on the type of documents necessary to best effectuate the client's estate plan. Such factors include:

A. PRIVACY CONCERNS.

If the relationship is private, the attorney must advise that the probate process is public, and information concerning the client's relationship will be made part of the public record.

If public disclosure is unacceptable to the clients, consider drafting a "pour-over" Will flowing assets into a Revocable Trust. The Will does not need to refer to the surviving partner at all—not even for the purpose of naming an Executor. If true privacy is required, a third-party can be named as Executor under both Wills to handle the administration, while each partner can serve as trustee of the other's trust.

The client may want to consider naming a close relative, a trusted CPA or attorney, or a financial institution as Executor of the estate.

B. POTENTIAL FOR A WILL CONTEST.

The attorney should explore whether either partner expects a challenge from a disapproving parent or sibling (or any other individual who would take under intestacy).

[10] N.J.S.A. 37:2-31 et. seq.

In some situations, the client has already had a falling-out with his or her family; in other situations, the family, while proving to be supportive while their child is alive, may withdraw that support should their child predecease them. The possibility of a Will contest should always be in the practitioner's mind.

In order to best defend against a Will contest, the attorney should begin preparing for one before the Will is executed.

The attorney should begin the drafting process by having each partner complete a detailed asset information sheet, which the client then signs certifying its accuracy. This sheet, while helpful in the planning stages, is evidence that the testator understood the extent of his assets and how he wanted those assets disposed of at his death. (The certification also serves as added protection to the cautious practitioner who wants to avoid being held accountable for failing to plan for assets of which he or she had no knowledge.)

In addition, it is good practice for attorneys to advise these clients to re-execute Wills more frequently (2 or 3 times over the next couple of years) than clients who have little concern for Will challenges. Nominal changes can be, but do not need to be, made to the documents (*e.g.* minor charitable gifts, the adding or subtracting of powers, etc.) while leaving alone the disposition to the surviving partner. The Wills executed over a period of years would have the added benefit of demonstrating both testamentary capacity and testamentary intent.

C. DISINHERITING INTESTATE TAKERS.

Many same-gender couples intend to explicitly disinherit particular family members. The practitioner must determine the best way to achieve the client's intent while not creating an opening for a Will contest.

Any clause disinheriting a parent, sibling, or anyone else, should be a simple statement of such and should not indicate any reason whatsoever as to why the person is being disinherited.

Sample Language: " I hereby make no provision for, and specifically disinherit my parents, JOHN & JANE DOE. I direct that they shall be entitled to no portion of my estate."

If the client feels strongly about including a reason for doing so, a better practice would be to have the client write a letter addressed to the disinherited person or the Executor, to be kept alongside his Will and to be released only after his death.

Another, less dramatic option, would simply be to draft a Will making no mention of the disinherited parties. If similar Wills are re-executed over a period of time, a pattern of testamentary intent would then exist making a successful Will challenge more unlikely. A similar letter could accompany the Will explaining the testator's reason for making such omission.

D. FUNERAL ARRANGEMENTS.

It is important to determine who the clients want to handle their funeral and burial arrangements. New Jersey law provides that unless a testator otherwise appoints in her Will, her funeral and burial arrangements will be controlled by individuals in the following order:

1. Her Spouse (of which she has none if she has not entered into a civil union prior to her death);
2. A majority of her surviving adult children;
3. Her surviving parent or parents; and, lastly
4. A majority of her surviving siblings.[11]

This means that for a non-unionized same-gender couple, control over the funeral and burial arrangements could be taken away from the surviving partner and placed in the hands of the decedent's immediate family. Failing to plan for this contingency may cause great animosity between the surviving partner and the decedent's family.

Even though most funeral arrangements are made prior to probate, the statute provides that such an appointment will be respected. A simple standard clause inserted at the beginning of the Will should be sufficient:

Sample Language: " I hereby direct that JANE DOE shall control my funeral and burial arrangements."

If such language is included, the person to whom control is given should be placed on notice of the testator's decision; and that person must be aware of where the Will is located and must have immediate access to it upon the testator's death.

E. PRACTICAL DRAFTING.

When it comes to drafting documents, attorneys are often unsure as to how to refer to the same-gender partner. Depending on the circumstances, traditional language used for married spouses may or may not be appropriate.

[11] N.J.S.A. 45:27-22

For example, consider the following choices:

1. I devise to my Husband, JOHN DOE, my residuary estate.
2. I devise to my Spouse, JOHN DOE, my residuary estate.
3. I devise to my Partner, JOHN DOE, my residuary estate.
4. I devise to JOHN DOE my residuary estate.

For partners who are unionized, the choice is usually between options (2) and (3), though it should always be a point of discussion with the client. For older clients, use of choice (1) may sound utterly bizarre, while choices (2) or (3) may sound more natural. For younger clients, the reverse may be true.

For partners who are not unionized, the choice should be between options (2), (3) and (4). Choices (2) and (3) tend to sound better, but if elected, should be accompanied by a definitional clause defining what the testator meant by using the word "Spouse" or "Partner".

Sample Language: " The term "Spouse" [or "Partner"] means the person with whom I am residing in a committed relationship at the time of my death. The term includes, but is not limited to, a person whom I have expressly identified as my partner in any public registration of domestic partnership, civil union, civil partnership, civil marriage, or the equivalent, which has not been terminated at the time of my death."[12]

The practitioner must keep in mind that while a judgment of divorce or annulment automatically removes the named Spouse as beneficiary, in the instance where the couple is not unionized, the ending of that relationship will not automatically remove the named beneficiary even when defined as "Spouse" for purposes of the testator's Will.[13] Under these circumstances, the client must execute a new Will to avoid the litigation that will undoubtedly result.

For this reason many practitioners are uncomfortable using any language containing certain legal presuppositions—such as "Spouse"—when no such legal relationship exists. These practitioners prefer using options (3) or (4) while including a paragraph or section defining the type of committed relationship at the beginning of the document.

[12] Language provided by Stephen J. Hyland, Esq.
[13] N.J.S.A. 3B:3-14

V. OTHER ESTATE PLANNING DOCUMENTS

Other important estate planning documents include the client's Living Will, Health Care Proxy, and Durable Power of Attorney. These documents all concern matters to be addressed while the client is alive, and therefore are significant when planning for same-gender couples. Absent such documents, in the case of incapacity of the client, that client's parents or siblings could wrest control away from the client's partner.

A. DURABLE POWER OF ATTORNEY.

A power of attorney designates an agent to act on the principal's behalf when dealing with financial institutions. A power of attorney can also authorize the agent to handle business matters, gift assets, and manage real property, in addition to dealing with any number of other financial issues.[14]

Although a power of attorney can become effective upon the disability or incapacity of the principal—so called "Springing Powers"—in the wake of HIPAA and other roadblocks to triggering such enabling provisions, it is generally advisable to make such powers effective at signing.

For same-gender couples, the partner is generally named as agent. Many individuals do not want to name alternate agents because they claim to have nobody else that they trust. In many instances however, after gentle prodding by the attorney, a close friend, or sibling, or other party usually emerges as a logical choice for an alternate agent. The attorney should review these drafting decisions in annual client meetings to ensure that the documents continue to best serve the client.

Another important concern is the statutory right of a financial institution to refuse accepting a power of attorney over ten (10) years old if the document names an agent other than that principal's spouse.[15] For same-gender couples, this restriction should be a cause for concern, and attorneys must advise their clients that the powers should be updated at least every ten (10) years.

When acting as agent under a power of attorney, such agent often must obtain medical information on the principal. Since a same-gender couple, unionized or not, will not be considered as "spouses" under federal law, HIPAA language must be inserted to specifically authorize the agent to obtain health-related information.

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[14] Powers of Attorney are governed by N.J.S.A. 46:2B-8.1 et seq.
[15] N.J.S.A. 46:2B-13 (b).

Sample Language: " I intend for my Agent to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (also known as "HIPAA"), 42 USC 1320d and 45 CFR 160-164.

I authorize any physician, health-care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health-care provider, any insurance company and the Medical Information Bureau Inc. or other health-care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment from me for such services, to give, disclose and release to my Agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse.

The authority given my Agent shall supersede any prior agreement that I may have made with my health-care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my Agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health-care provider."

In addition, the power of attorney should contain language directing that in the event a guardian or conservator is needed, that such appointment be given to the principal's partner. Absent such a provision, a court may appoint a parent or sibling as such guardian.

Sample Language: " In the event of my disability or incapacity, it is my desire and request that no Guardian or Conservator be appointed over my person or property. If, however, a Guardian or Conservator of my person or property is to be appointed for me, I hereby appoint my Agent hereunder to serve as Guardian and/or Conservator without bond."

B. HEALTH CARE PROXY & LIVING WILL.

Generally, a Health Care Proxy operates similar to a power of attorney in that it designates an agent (termed "Health Care Representative") to make medical decisions when the principal is unable to do so. The proxy authorizes the representative to access medical information and provides provisions detailing the extent to which the representative can act.[16]

A Living Will is similar to a proxy in that it also deals with medical decisions—however, the focus being on end-of-life decisions. A Living Will may also name a Health Care Representative to act in accordance with its terms.

Both documents must contain HIPAA authorizations.

For same-gender couples, these documents are essential as hospitals and medical practitioners often look to the patient's immediate family to make medical decisions. To facilitate the decision-making process, consider advising your clients to transmit copies of the proxy and Living Will to the medical provider upon their execution. Doing so will place the provider on notice of such designations, and practically speaking, if there are any questions concerning the documents, they can be addressed while the client is still competent.

Consider also including language in the proxy directing visitation rights. Such rights can be a contentious issue between the client's partner and biological family. A directive in the proxy and Living Will should be followed by the medical provider.

Sample Language: " Concerning visitation rights, I direct such medical institution to follow the direction of my Agent. I further direct that no person be granted visitation until my Agent has been given the opportunity to first visit with me and speak with medical providers concerning my care."

VI. PLANNING FOR THE NEW JERSEY ESTATE TAX

For estates with combined assets falling below the applicable exclusion amount[17] for federal estate tax purposes, planning for the New Jersey Estate Tax will be a primary concern.

[16] Advance Directives for Health Care (*i.e.* Health Care Proxies and Living Wills) are governed under N.J.S.A. 26:2H-53 et seq.

[17] The current federal applicable exclusion amount is $3.5 Million. This amount is slated to be repealed in 2010 and then to be reduced to $1 Million in 2011. However, there is a strong presumption that legislation

New Jersey currently taxes every dollar of an estate in excess of the $675,000 exclusion amount. The tax is variable fluctuating from a high of 37% for estates just over the exemption amount down to a low of around 7.5% for estates around $2,000,000 and then gradually back up again.

In calculating a decedent's taxable estate, New Jersey allows a deduction for assets passing to charity and to a surviving spouse. Although not allowed in filings with the IRS, New Jersey's Civil Union Act treats unionized couples as equal to married couples for estate tax purposes. This means that just like an estate plan for a married couple, the attorney is able preserve the exemption amount by claiming a spousal deduction for assets exceeding $675,000. The remainder of the estate can be placed in a "credit-shelter" trust.[18]

Where joint accounts are involved for non-unionized couples, an important consideration is New Jersey's position to include one hundred (100%) percent of the joint account in the estate of the joint owner. To rebut this presumption, evidence must be submitted showing the decedent's contribution to the accounts.

VII. PLANNING FOR THE NEW JERSEY INHERITANCE TAX

The New Jersey Inheritance Tax taxes transfers to certain beneficiaries regardless of the size of the decedent's estate. The inheritance tax contains four (4) separate classes of beneficiaries. A different tax rate and exemption amount applies to each separate class of beneficiary.[19]

1. Class "A" beneficiaries include the decedent's spouse, domestic partner, father, mother, grandparent, child or children, or the issue of such child or children.[20]

Class "A" beneficiaries are exempt from Inheritance Tax.

Couples who have entered into a civil union are Class "A" beneficiaries and as such, are not subject to the inheritance tax.

2. Class "C" beneficiaries[21] include the decedent's brother or sister, or the spouse of one of the decedent's descendants.

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will be passed (possibly even retroactively in 2010) either fixing the exclusion at $3.5 Million or $2 Million.

[18] Sometimes termed a "by-pass" trust or "non-marital" trust, the trust is designed to insulate the maximum amount that can pass free of New Jersey estate tax.

[19] N.J.S.A. 54:34-2 et seq.

[20] Stepchildren are also Class "A" beneficiaries; however, the children of stepchildren are Class "D" beneficiaries and are not exempt from tax.

Class "C" beneficiaries are taxed as follows: the first $25,000 passes to them tax free; amounts over that are taxed at a variable rate ranging from 11% to 16%.

If your client has a child in a civil union relationship, any transfer to that child's spouse would be considered a transfer to a Class "C" beneficiary.

3. Class "D" beneficiaries include everyone else.

Class "D" beneficiaries are taxed from 15-16% depending on the size of the transfer.

Unmarried couples, regardless of how long they've been living together, are considered Class "D" beneficiaries subject to the 15-16% tax. For same-gender couples looking at reasons to become unionized, this tax is often a strong consideration.

4. Class "E" beneficiaries are charities. These transfers are exempt from the Inheritance Tax.

VIII. FEDERAL GIFT TAX AND DOMA

Perhaps the most challenging estate planning issues concerning same-gender couples arise in the context of federal law. The Defense of Marriage Act (DOMA)[22] passed in 1996 prohibits the federal government from recognizing a same-gender union for any purpose. This means that a same-gender couple that has entered into a civil union will not be entitled to the benefits of marriage bestowed under federal law. In addition, solely as it impacts state marriage law, DOMA gives states the option as to whether to recognize a same-gender union or marriage entered into in another state.

With regards to estate planning, such lack of recognition means that no marital deduction is available for property passing to the surviving partner,[23] and gifts between same-gender spouses are not entitled to the unlimited gift tax marital deduction.[24]

The limitation on gifting can be quite severe. As is often the case, one partner is wealthier than the other. The wealthier partner is usually the one paying for household expenses, taxes, vacations, and other expenses without contribution

[21] There are no Class "B" beneficiaries as this section of the statute was deleted by amendment.
[22] P.L.104-199 (1996).
[23] IRC § 2056.
[24] IRC § 2523.

by the other partner. Furthermore, if the wealthier partner owns the home, having the other partner live there without paying rent would be considered a gift of the fair market rental value.

Same-gender couples must be counseled to take full advantage of the remaining gift tax exclusions. Currently, every individual can gift $13,000—the annual exclusion amount—without incurring gift tax (or using his or her lifetime gift tax credit).[25] In addition, payments made directly to an educational organization or medical provider on behalf of another individual are also exempt from gift tax.[26] Also, the $1,000,000 lifetime gift tax credit can be a valuable resource for gifting in excess of the annual exclusion amount.[27] To preempt questions on an IRS audit, detailed records should be maintained outlining the extent of the payments made.

For example, suppose Client A owns a home worth $500,000. Client B, A's civil union partner, lives in the home without paying rent. Client B pays 50% of all utilities. Supposing the fair rental value of this home is $3000 a month, Client A will be deemed to have made an annual gift to Client B in the amount of $18,000 (50% of $3000 x 12 months). Note that this gift is in excess of the $13,000 annual exclusion amount. This means that Client A is required to file a gift tax return every year absorbing the $5,000 difference ($18,000 minus $13,000) from Client A's lifetime gift tax credit.

Another practice is to have the clients execute a standard lease agreement fixing B's monthly lease payments at $500.[28] The remaining $1000 a month would be a deemed gift, but because the annual gift now totals $12,000 ($1000 x 12 months), which is less than the annual exclusion amount, no gift tax return needs to be filed. Client A, in this example, does not lose his lifetime gift tax credit. Of course, when calculating such an agreement, all annual gifts need to be considered.

Real property presents considerable challenges when planning for a same-gender couple. As is the norm with married couples, attorneys regularly deed real property from one spouse to the other, or to both as either tenants in common or tenants by the entirety. Although the Civil Union Act permits tenancy by the entirety for civil union couples, the transaction effecting title has federal gift tax implications.

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[25] IRC § 2503(b).
[26] IRC § 2503(e).
[27] IRC § 2505.
[28] Note that the $500 a month would be reportable income to A. This technique, which potentially results in increased income tax to A, would need to be balanced against the gradual utilization of A's lifetime gift tax credit.

In the example above, if A chooses instead to deed the home to both A and B as either tenants by the entirety or tenants in common, the transfer would be a gift to B of 50% of the fair market value of the home. Conversely, if A does not transfer half of the home to B, A will be limited to an income tax exclusion of $250,000 on gain recognized on the sale of the property.[29] The section 121 exclusion of up to $500,000 does not apply to same-gender couples.

One possible solution is to have B "purchase" a 50% interest in the home by means of a promissory note. The note can be an interest-only note with a balloon payment due upon the sale of the home. This transaction would treat A and B as owners of real property for purposes of IRC Section 121.[30] In addition, assuming the note is properly structured, there will not be a gift for gift tax purposes. Additionally, from A's point of view, since the "sale" to B generates reportable income, A must elect out of the installment method for reporting that income in order to utilize the full value of A's 121 exclusion[31] (assuming all requirements are met) at the time of the sale to B.[32]

IX. RETIREMENT ASSETS

The Pension Protection Act of 2006 (PPA) changed retirement asset planning for same-gender couples. Prior to the PPA, rollovers of qualified plans were only available to the participant's spouse. With the PPA, for distributions occurring on or after January 1, 2007, any beneficiary of a qualified plan may now rollover such distribution into an "inherited" IRA further deferring income taxation on the benefit. [33]

Since DOMA prevents recognition of civil union spouses, prior to the PPA civil union spouses were not able to roll over their survivor benefits. Although probably an unintended consequence of the PPA, the new rules greatly facilitate estate planning with retirement assets for same-gender couples.

The attorney should review the client's retirement asset plan to ensure the plan complies with the PPA and that proper beneficiary designations are in place.

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[29] IRC § 121.

[30] Since federal law defers to state law on ownership issues concerning real property, it is unclear as to whether the federal government would respect a tenancy by the entirety for a civil union couple, or whether the government would treat such ownership as tenants in common. In either instance, the IRC §121 exclusion is preserved.

[31] C.F.R. § 1.121-4(e)

[32] IRC § 453

[33] For a complete discussion of non-spousal rollovers, see Appendix 1 to Natalie B. Choate's September 1, 2007 amendment to Life and Death Planning for Retirement Benefits, 6th edition, 2006.

X. LIFE INSURANCE

Life insurance provides liquidity at the death of the insured, and as such is an important component of many estate plans. Life insurance can be used to pay taxes, replace lost income, manage business succession planning, fund a trust; in addition, life insurance can be used to manage and plan for any number of specific concerns particular to an individual client.

Generally, life insurance benefits are excluded from gross income if such benefits are paid by reason of the insured's death.[34] However, life insurance is included in calculating the decedent's gross estate for estate tax purposes if it is either (1) payable directly to the decedent's estate, or (2) payable to any beneficiary under circumstances where the decedent at his death maintained "incidents of ownership" over the policy.[35]

In New Jersey, life insurance is excluded from calculating the inheritance tax if the proceeds are paid to a named beneficiary other than the decedent's estate or the executor of the decedent's estate.[36] This means that life insurance includible for estate tax purposes may be excluded for inheritance tax purposes.

Traditional estate planning for life insurance is to have the proceeds excluded from both estate and inheritance tax. Such planning is accomplished by transferring the policy to (or even better, having the insurance purchased by)[37] an irrevocable trust designed to hold life insurance. Although the intricacies of such trusts are beyond the scope of this article, practitioners need to carefully weigh the benefits of estate tax exclusion versus the inherent inflexibility of an irrevocable trust.

Such inflexibility is of particular concern when planning for same-gender couples. Relationships dissolve, couples divorce. A client may not want to place significant amounts of insurance in an irrevocable trust—the partner being the trustee with power over all decisions relating to the insurance.

One technique is to place the insurance in a revocable trust (or at least name the revocable trust as beneficiary of the policy). While still subject to estate tax, the revocable trust is a "named beneficiary" exempt from inheritance tax. The revocable trust can contain provisions for funding marital and "credit-shelter" trusts, and the revocable trust permits the client to retain control over the policies.

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[34] IRC § 101. (But see IRC § 101(j) for the treatment of certain employer-owned life insurance contracts, the benefits from which may not be excluded from income.).
[35] IRC § 2042.
[36] N.J.A.C. 18:26-6.9
[37] The direct purchase avoids the three (3) year look-back provision of IRC § 2035(a).

If the policy is owned by the trust, provisions and a triggering mechanism can be included for the trust to become irrevocable at some future date. Use of the revocable trust to manage life insurance should not be overlooked by the practitioner looking for ways to build flexibility into an estate plan.

If however life insurance is payable to the estate (subjecting it to both estate and inheritance taxes) an important distinction is magnified between same-gender couples who are unionized as opposed to couples that are not. For same-gender unionized couples, the estate tax marital deduction is available to deduct the amount of that insurance passing to the surviving partner. In addition, that partner is a Class "A" beneficiary for whom transfers to are exempt from inheritance tax. If the couple is not unionized, no marital deduction is available and the proceeds passing through the estate would be subject to the inheritance tax imposed on transfers to Class "D" beneficiaries!

XI. CONCLUSION

Same-gender couples will continue to represent an ever-increasing portion of the estate planner's clientele. For these couples, the issues they face are no less important than the issues faced by traditional married couples. The practitioner must familiarize himself or herself with the unique planning considerations, and the practitioner must follow the law closely as it develops.[38] With a little bit of effort any attorney can begin to understand and plan for the challenges facing same-gender couples.

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[38] For an excellent resource, see attorney Stephen J. Hyland's website http://stephenhyland.com/.