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## Estate Planning Considerations for Same-Sex Couples in Light of *Goodridge v. Department of Public Health*

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On November 18, 2003, the Massachusetts Supreme Judicial Court ruled, in *Goodridge v. Department of Public Health*, that prohibitions against same-sex marriages violate the state's constitution. Despite a proposed legislative amendment to the state's constitution that would define marriage as a union between a man and woman while simultaneously creating civil unions, such an amendment cannot be voted on until November 2006 at the earliest. As a result, same-sex marriages became legal in Massachusetts on May 17, 2004.

As many same-sex couples now intend to enter, or have already entered, into a legal marriage in Massachusetts, it is important to understand how the new law impacts such individuals' existing estate plans and how they can alter their estate plans to take advantage of legal rights previously withheld from them.

### **Marriage Revokes a Will**

One of the most important things that same-sex couples need to know—whether they are contemplating marriage, or have already married—is that a will, unless it expressly states that it is being executed in contemplation of marriage, is revoked by marriage. Wills of same-sex couples that were executed before marriage are void, and, if each spouse does not re-execute a new will, he or she will be deemed to have died intestate (that is, without a legal will) and his or her property will pass according to the laws of intestate succession.

The laws of intestate succession are an attempt on the part of a state to dispose of an individual's property to, and among, his or her closest living relatives. In this context, "property" includes all property owned solely in the deceased spouse's name. It does not include joint property that automatically passes to the surviving tenant or property that has a designated beneficiary, such as life insurance and qualified benefit plans, which pass by law to the named beneficiary.

As an example, if a married Massachusetts resident dies intestate with no children, the surviving spouse will receive the first \$200,000 of any property the deceased spouse owns plus one-half of the value of the property in excess of \$200,000. The remaining portion will pass as though the deceased spouse were a single person—to the deceased spouse's then living parent(s), if any, and

if none, to his or her then living siblings or the children of any deceased sibling. If a deceased spouse has no siblings, half of this excess property will pass to his or her next of kin—uncles, aunts, cousins and so forth. Finally, if there is no living next of kin, the property reverts to the Commonwealth of Massachusetts.

If a married Massachusetts resident with children dies, one-half of his or her property will pass to the surviving spouse while the other half will pass directly to the children in equal shares.

For same-sex couples that are not residents of Massachusetts or who move outside of the Commonwealth subsequent to their marriage, it is conceivable that intestacy provisions benefiting the spouse would not be honored by the state of domicile and, as a result, the surviving spouse may not be entitled to any of the deceased spouse's property.

Therefore, it is important for same-sex couples contemplating marriage or who have been recently married to contact their estate-planning attorney to re-execute existing estate plans or to sign new wills if they do not yet exist.

### **Estate Tax Benefits**

The Federal Defense of Marriage Act (DOMA), passed in 1996, defines the words "marriage" and "spouse" for all purposes of federal law to refer only to marriages between a man and a woman. Although the constitutionality of DOMA is questionable, under DOMA, federal estate tax benefits available to opposite-sex married couples will not currently apply to same-sex spouses. Consequently, while opposite-sex couples may leave an unlimited amount of property to a surviving spouse free of federal estate taxes, a same-sex spouse may only leave the federal exemption amount to his or her spouse before incurring an estate tax liability. This exemption amount is currently \$1,500,000, but is scheduled to increase in stages over the next several years.

However, same sex-couples might benefit from estate tax deductions and other Massachusetts tax benefits not previously available to them. As a result, estate plans, retirement designation forms and life insurance planning should all be reviewed.

Despite being deprived of the federal benefits available to opposite-sex spouses, same-sex spouses can take advantage of some sophisticated estate-planning techniques to help reduce the burden of federal and Massachusetts estate taxes, including some powerful techniques not available to opposite-sex spouses.

### **Ownership of Real Estate**

Same-sex spouses should exercise caution before taking title to the primary residence as joint tenants (or tenants by the entirety) if one spouse has contributed a disproportionate amount of the down payment or pays a disproportionate amount of the mortgage payments. Unintentional gift tax consequences may result, as a same-sex spouse may transfer free of gift taxes only \$11,000 annually to his or her spouse (unless he or she applies part of his or her \$1 million gift tax exemption to the gift), while an opposite-sex spouse may gift an unlimited amount to his or her spouse without gift tax consequences (and without using any of his or her \$1 million gift tax

exemption) as long as the spouse is a US citizen.

These are only a few of the many challenges facing same-sex couples in the estate-planning arena. Same-sex couples are encouraged to speak with their estate-planning attorney in order to obtain a more complete picture as to how the change in Massachusetts laws impacts them.