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**ESTATE PLANNING FOR SAME SEX COUPLES, MARRIED OR NOT, IN LIGHT OF
THE U.S. SUPREME COURT DOMA AND PROP 8 RULINGS**

By Linda M. Scaparotti¹

California Law Applies to RDP's and Spouses Equally

1. Intestate Succession

- a. If a Spouse/RDP dies intestate, or dies testate and by the will he or she devises all or part of the property to the surviving Spouse/RDP, the property may pass to the surviving Spouse/DP without estate administration.
- b. Surviving Spouse/DP will be entitled to all of the community property, and his or her own share of the separate property. If decedent had a child, Spouse/DP will inherit one half of deceased's separate property. If two or more children, Spouse inherits one third of deceased's separate property. If deceased had no children, but is survived by a parent or other siblings, the surviving Spouse will inherit one half of deceased's separate property.
- c. Any estate plans executed before registration or marriage that do not

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Linda M. Scaparotti has been in practice throughout the San Francisco Bay Area for 33 years, specializing in estate planning and family law issues for the LGBT community. She writes and lectures extensively on these issues, as well as donating over 600 hours a year to non-profit organizations such as NCLR, HRC, Horizons Foundation, EQCA. Attorney Scaparotti has worked with over 2000 couples, individuals and families, helping them to clarify, structure, and protect their varied relationships.

provide for the domestic partner/spouse, will fail to the extent the surviving DP/Spouse is protected as an omitted spouse, as well as omitted children.

- d. In drafting new plans explain about omitted spouses and children.
- e. Non-probate transfers of community property, such as retirement plans, will require the consent of the other Spouse/DP.
- f. A Spouse/DP cannot transfer or encumber community property without joinder of other Spouse/DP.
- g. Estate Planner should be careful not to gift or draft a disposition of community property to someone other than the other Spouse/DP.

2. CA Family Protection Statutes

- a. Family Allowance- petition for protection for him/herself and children.
- b. Probate Homestead- right to stay in real property of decedent.
- c. Election to Take Against Will- Surviving DP/Spouse entitled to make an election to take against the decedent's estate plan.
- d. Spousal/DP Property Petition. No limit on value. Goes quicker.

3. Other Estate Planning Rights

- a. Priority for appointment as conservator, executor, or guardian of children.
- b. Authority to make medical decisions on behalf of the partner.
- c. Guarantee of hospital visitation rights.
- d. Authority to carry out memorial or burial instructions.

Federal Gift & Estate Related Taxes Post DOMA

- 1. Estate and gift tax planning techniques available to ALL married couples.
- 2. Unlimited marital deduction of I.R.C. 2056 is now available to same sex married

couples.

3. Lifetime exclusion no longer used up in transfers to spouses as was previously.
4. Unlimited gifting between spouses.
5. No taxation upon dissolution in transferring assets between the divorcing spouses. (Married couples exempt under I.R.C. 2516.)
6. Double Step-Up in Basis for Community Property.
7. Portability, carry over of exclusion to the surviving spouse, shielding of \$10.5 million from estate tax.

Specific Issues for Unmarried and Non-Registered Partners

1. **All Rights are Missing.** People who are not married or not registered as domestic partners, possess none of the basic legal rights enjoyed by legally recognized spouse:
 - a. No rights as an heir
 - b. No priority for appointment as conservator, executor, or guardian of children
 - c. No authority to make medical decisions on behalf of the partner
 - d. No guarantee of visitation rights
 - e. No authority to carry out memorial or burial instructions
 - f. No family allowance
 - g. No probate homestead
 - h. No summary administration of estate (spousal property petition)

Revocable Living Trusts/Marital Trusts

1. A trust is a legally enforceable document that will be harder for relatives to contest, particularly if you executed it years before death and the trust has been followed since then. It is a private document which contains the same type of distribution directions as a will does, including estate tax savings.

- 1.) If you become disabled, your choice as successor trustee will step in to pay your bills and help monitor your investments.

- 2.) You can set aside assets for your partner's lifetime which will pass to your chosen beneficiaries at your partner's death, tax-free.
- 3.) You can avoid all probate costs and have a private disposition of assets.
- 4.) Provide continuity and coordination at death.
- 5.) Transferring property into the trust. The trust governs only the properties that are transferred to it. To get the full benefit of the trust, property must be re-titled from individual name to the name of the trustee. You have the same ownership rights over the property as a trustee that you had as an individual.
- 6.) Marital Trusts gain the use marital deduction clause as funding formula- estate tax marital deduction for Spouses.
- 7.) Marital Trusts reflect the relationship, can hold assets jointly in one trust, especially important for those couples where one earns income and other stays home with children.

Advance Health Care Directives

1. Terry Schiavo situation. Express wishes clearly re life support etc.
2. Being able to reside in the same long term care facility.
3. Instructions for special needs re religion, food, hospice.
4. Particular instructions re pregnancy and tough choices that might have to be made.

Financial Powers of Attorney

1. Management of a business, law practice, or financial complexity for which Spouse is not the right person.
2. Avoid conservator being appointed if spouse doesn't survive you or gets ill.

Simpler Plans

1. Many clients can do much simpler plans now. Will, Property held "Spouses as Community Property with Right of Survivorship", AHCD, FinPOA.
2. Estate under \$150,000/ \$50 k for real property.

2. If have children, need a Trust with Pour Over Will.
3. If value of estate is close to \$5.25 mil, then utilize Bypass Trust or Q-Tip.
4. Will does not avoid probate. Use Trusts for privacy, or leaving assets to non-spouse. \$150,000 or less in CA can pass to non-spouse outside of probate.
(Real estate=\$50k)

Need to Still Do Estate Planning

1. Those who move to other states will not be protected by California statute, for inheritance or medical and financial decisions in the case of disability, right to make funeral and burial decisions.
2. Helps avoid litigation at disability or death.
3. Avoid problems of omitted spouses and children. Probate Code Section 21610.
4. Avoiding probate for children and non-registered/married partner.
5. Special structuring issues for children.
6. Special structuring issues such as Bypass or Set Aside Trusts.
7. Terry Schiavo issues re End of Life Decisions -Advance Health Care Directive.
8. Management of a business.
9. Structuring to minimize taxes.
10. Non-registered domestic partners must do estate planning as no rights at all.
11. But many can do a very simple plan and it will be just fine!