Now That I Can Say "I Do," Do I? Prenuptial Agreements and Marriage Equality

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When a married individual dies, every state has laws granting certain rights to the decedent's surviving spouse. For example, when a married person domiciled in Ohio dies, his or her surviving spouse is granted numerous property rights as a matter of law such as, among other things, the right to receive a portion of the assets constituting the deceased spouse's probate estate regardless of the provisions of the deceased spouse's Last Will and Testament *(even if the deceased spouse's Last Will and Testament specifically states the surviving spouse is disinherited!)*, the right to receive a family allowance, the right to remain in the mansion house free of charge for a period of time following the spouse's death, as well as the entitlement to receive notification at certain times throughout the deceased spouse's estate administration process. A surviving spouse is also considered in the distribution of damages awarded in a civil action for wrongful death. Such privileges are granted to surviving spouses only; not to domestic partners, individuals who have entered into a civil union or other couples who are considered by state law to be unmarried.

Historically, lesbian and gay couples never needed to consider the rights each had to the other's property upon death because marriage was not available. On the contrary, most lesbian and gay couples spent considerable time, energy and resources attempting to preserve and protect their resources to benefit the survivor. This all changed for members of the LGBTQ+ community on June 26, 2015, when the U.S. Supreme Court decided in a landmark decision *(Obergefell v. Hodges)* that the fundamental right to marry is guaranteed to same-sex couples and that the marriages of same-sex couples should be recognized on the same terms and conditions as marriages of opposite-sex couples, including all the accompanying rights and responsibilities.

While members of the LGBTQ+ community (and others) rejoiced that they were now living in a marriage equality era, lesbian and gay

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couples considering marriage were now faced with the challenges of the legal aspects of marriage – in addition to love. This oftentimes resulted in lesbian and gay couples analyzing before tying the knot whether a prenuptial agreement was appropriate for their personal situation.

The laws of every state grant various rights and privileges to married couples in the event the marriage terminates by divorce or dissolution. Ohio and Kentucky are no exception. However, Ohio and Kentucky both afford couples intending to marry the opportunity to enter into a contract before their wedding day whereby they can set forth guidelines and parameters for the distribution of assets should the marriage end by divorce or dissolution. Such contracts are typically referred to as "prenuptial" or "premarital" agreements and can also include what rights, if any, each person has to the other's property at death.

Prior to the legalization of same-sex marriage, domestic partnership agreements were used in many instances by lesbian and gay couples as a vehicle to establish certain legally enforceable rights between each other, especially if property was owned by them jointly. However, those agreements were neither universally nor uniformly recognized by certain states. A domestic partnership was somewhat more difficult to define legally. A civil union provided more clarity, when available, because those unions were created by states legally (either statutorily or by judicial decision) but neither domestic partnerships nor civil unions provided the clarity and certainty the institution of marriage afforded to all couples from a legal perspective.

Lesbian and gay couples entering into marriage, should not only consider the benefits and disadvantages of prenuptial agreements but also implement an estate plan that reflects not only their wishes, but their legal obligations and responsibilities to one another. An estate plan should include a Last Will and Testament (which not only addresses how one's property is to be distributed upon death, but also nominates who will be the deceased's representative at death – commonly referred to as an Executor or Personal Representative). A living trust (also referred to as "revocable trust agreement" or "*inter vivos* trust agreement") is a

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common estate planning vehicle used to accomplish a plethora of estate planning objectives. For example, the trust agreement can provide for the trustee to hold the trust assets for the benefit of the surviving spouse so that the assets can be made available for the benefit of the surviving spouse, while at the same time stipulate for the distribution of any assets remaining in the trust at the surviving spouse's later death. Another consideration for incorporating a trust into an estate plan is for estate tax planning and whether the availability of the marital deduction helps preserve family wealth for the next generation.

Planning for the possibility of becoming incapacitated is becoming more common and can be done by implementing a Durable Financial Power of Attorney and naming someone who has the legal authority to act on one's behalf for legal and financial matters should the individual be unable to do so herself or himself. If one becomes incapacitated and unable to manage his or her financial affairs and does not have a valid Durable Financial Power of Attorney in place, a guardianship proceeding may be instituted whereby a judge would appoint an individual to serve as legal guardian for the incapacitated individual.

With respect to healthcare matters, married couples routinely execute healthcare proxies (commonly referred to as "durable powers of attorney for healthcare" or "medical directives") which authorize another individual to make medical decisions for an individual when he or she is unable to do so. Such authorizations are typically very broad and allow another person to make all types of medical decisions on behalf of the incapacitated person, such as consenting to surgery, authorizing transportation to another healthcare facility, and accessing medical records. Similar to a Durable Financial Power of Attorney, should one become incapacitated without executing a healthcare proxy, a court proceeding may be initiated in order for a court to appoint a guardian who would make medical decisions on behalf of the incapacitated patient.

A living will directive or living will declaration is a document expressing an individual's desire concerning how he or she wishes to be treated from a medical perspective in certain circumstances.

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Typically a living will directive or declaration is only operative if the patient is in a terminal condition, a permanently unconscious state, or some other seriously grave condition. Such a directive or declaration sets forth a person's desire to discontinue healthcare treatment in certain circumstances, including the administration of artificially supplied nutrition and hydration, and allow the patient to die naturally. Married couples typically execute both a healthcare proxy and a living will directive and deliver a photocopy of these documents to their healthcare providers.

When planning their nuptials, lesbian and gay couples should work with an experienced attorney to not only review whether a prenuptial agreement is appropriate in their specific circumstance, but also how to create an estate plan that reflects their intentions in providing for one another until death they do part.

For more information, please contact Bernard L. McKay or any attorney in Frost Brown Todd's Estate Planning & Administration practice group.

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