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SYMPOSIUM: ISSUES IN ESTATE
PLANNING FOR SAME-SEX AND
TRANSGENDER COUPLES

FOREWORD

JENNIFER L. LEVI*

One of the most haunting calls that I received during my legal career focused on the scope of a power of attorney document. Shortly after beginning a job at a public interest legal organization, I received a call from a woman whose female partner of twenty-six years had been diagnosed with early onset Alzheimer's disease. The caller reported to me that she had come home one day to an empty house when she had expected her partner to be home. She assumed the worst and made numerous calls to local hospitals, as well as the police and rescue officials in the town. Nearly two days later, the caller learned from her partner's estranged sister that her partner's family of origin had come to town and taken her partner to a long-term care facility in another community nearly four hours away so that it would be easier for them to visit. The caller was understandably concerned about these developments but was sure that she would be able to transfer the partner back to a local facility because, after all, the caller had been given power of attorney by her partner.

According to the caller, these two women had long worried about this kind of scenario because of the strained relationships

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with both of their families over many years. In order to avoid this kind of problem, the women had each executed a power of attorney, which granted (or so they thought) authority to each other over medical decision making in times of crisis. Hearing this, I was initially unconcerned. What I learned over the course of the next several days, however, was that the documents they had drafted had not actually been created with this scenario in mind. The women did not understand that the decision-making authority would not survive the mental incapacity of either of them, nor did they understand that it was in fact their families of origin who would have decision-making authority should either of them become mentally incapacitated.

Learning this, I was beyond frustrated. How could this have happened? I quickly learned how easily it did happen. These two women, one in her mid-fifties, the other in her early sixties, had not consulted an attorney who was properly trained in estate and family planning for same-sex couples. The attorney they sought advice from had not bothered to ask about the nature of the two women's relationship. The attorney had not bothered to explore the likely consequences for these women if there was a disagreement about decision making between either of the women and her family of origin. Nor did the attorney sufficiently inquire to learn that it was not so much the day-to-day bookkeeping matters that they wanted to address by executing a power of attorney. Rather, they wanted to be sure that their relationship would be fully respected, just as the relationship between marital spouses would be respected in comparable circumstances. So, when I explained that there was little or nothing I could do to help them, the caller repeatedly said in response that surely there must be some way to get around what she considered a technical glitch.¹ How I wished there had been, but, as far as I could discern, there was not.

Over the next several years, I heard many more stories that deepened my appreciation of the need for family and estate planning for same-sex couples, as well as those in which one (or both) of the partners is transgender. There was the case of a gay male couple in a committed, long-term relationship, one of whom was a decorated World War II veteran and firefighter.² When he died af-

1. See, e.g., *Guardianship of Smith*, 684 N.E.2d 613 (Mass. App. Ct. 1997) (discussing the requirements for a durable power of attorney and causes for disqualification).

2. Gary Buseck, Keynote Address, *Civil Marriage for Same-sex Couples*, 38 NEW ENG. L. REV. 495, 499 (2004).

ter a seven-year struggle with throat cancer, his pension died with him, leaving his partner of forty years financially vulnerable.³ Additionally, there was the case of the surviving partner who could not fulfill his dying partner's wish to be cremated because the deceased had not made proper arrangements and his family of origin had other plans for his funeral.⁴ There have been many cases involving a transgender person who wondered whether he or she could legally marry the person with whom he or she was in love with and what legal effect it would have in the state where the marriage was entered into, as well as the state where the couple might later move. Just as same-sex couples face legal uncertainty regarding their status, so too do couples where one of the partners is transgender because marriage is nearly an exclusively heterosexual privilege and the sexual orientation of transgender individuals is sometimes called into question by the law—ignoring both self-identity and state-attributed identity.⁵

Legally, much has changed for these couples since I received that call nearly ten years ago. At that time, no states had any legal status that even distantly approximated marriage available to couples that did not meet the traditional heterosexual paradigm. Since then, Massachusetts (where the caller and her partner resided) has removed the gender requirement for marriage as a result of the Supreme Judicial Court's interpretation of the state's constitutional guarantees of equality and liberty.⁶ Seven other states currently allow same-sex couples not to enter into marriage, but to enter into near legal equivalent statuses either as a result of judicial decisions or legislation.⁷ Had the couples referenced above been able to marry, despite their genders and before they faced the crises they did, most of them never would have experienced the hardships

3. *Id.*

4. *Id.* at 497. See generally MASS. GEN. LAWS ch. 114, § 5B (2004) ("Each such cemetery corporation shall notify . . . the family of the deceased or the person making funeral arrangements for the deceased of the choice of three options for burial services.").

5. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); Julie Greenberg & Marybeth Heald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 WASH. L. REV. 819 (2005).

6. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

7. CAL. FAM. CODE §§ 297-299.6 (West 2004); CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West Supp. 2008); N.H. REV. STAT. ANN. §§ 457-A:1 to -A:8 (2008); N.J. STAT. ANN. §§ 37: 1-30 to -36 (West 2007); WASH. REV. CODE § 26.60.030 (West, Westlaw through 2007 legislation); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); H.R. 2007, 74th Leg. Assem., Reg. Sess. (Or. 2007).

that resulted from the state and their family members ignoring their committed relationships.

Despite the sea of change in possibilities for creating lawful relationships for many gay, lesbian, bisexual, and transgender individuals, most jurisdictions do not allow them to marry or enter into any comparable legal status. The vast majority of states either by statute or state constitutional amendment actually prohibit marriage for same-sex couples.⁸ And, even when couples can marry or enter into a comparable legal status, they are faced with uncertainty regarding what effect, if any, will be accorded to that status should they travel or move.⁹ In addition, because of the federal Defense of Marriage Act,¹⁰ married same-sex couples continue to face discrimination against their relationships at a federal level and questions remain about the legal weight of those relationships for purposes of certain joint federal and state programs such as Medicaid.

Given the legal challenges that same-sex couples face, the need for high-quality estate planning for same-sex couples is greater than ever. This Symposium focuses on estate planning for same-sex couples and provides a wide range of essential information for lawyers practicing in a dynamic legal environment. Attorney A. Spencer Bergstedt offers a first-of-its-kind practical guide, which includes key legal analysis for conducting estate planning for transgender clients. Attorneys Aimee Bouchard and Kim Zadworny offer comprehensive guidance for counseling aging same-sex couples. Finally, attorney Patience Crozier provides important foundational information about estate planning in Massachusetts through a pre- and post-*Goodridge* lens. Her view is significantly informed by her family law background and includes essential information for family and estate planning for clients with and without children.

Given the paucity of practical guidance for attorneys in this area, this Symposium comes at a critical time. Focusing on an area that is swiftly responding to shifts in legal, cultural, and political views, this Symposium is sure to set a foundation by which later contributions will be measured.

8. See, for example, Alabama, ALA. CONST. art. I, § 36.03 (2006), ALA. CODE § 30-1-19 (2008); Alaska, ALASKA CONST. art. I, § 25 (1999); Arizona, ARIZ. REV. STAT. ANN. §§ 25-101, -112 (2007); Arkansas, ARK. CODE ANN. §§ 9-11-107-109, -208 (2008); Colorado, COLO. CONST. art. II, § 31, COLO. REV. STAT. § 14-2-104 (2005); and Florida, FLA. STAT. §§ 741.04, .212 (2005).

9. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions*, 153 U. PA. L. REV. 2143, 2153-59 (2005) (“[Migratory marriages] are hard cases, and it is not clear how they ought to be addressed.”).

10. 1 U.S.C. § 7 (2000).