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NUTS AND BOLTS: ESTATE PLANNING AND FAMILY LAW CONSIDERATIONS FOR SAME-SEX FAMILIES

PATIENCE CROZIER*

Five years after the landmark decision of *Goodridge v. Department of Public Health*¹ many questions remain open for lawyers, clients, governmental agencies, and courts about its ramifications. In the intertwined subject areas of family law and estate planning, it is particularly true that gray areas and questions abound, making it critical for practitioners to stay informed about changes in the law to identify and resolve any problems that may arise. When couples come through the office door to discuss adoption, the implications of marriage, prenuptial agreements, donor agreements, or domestic partner agreements, it is essential to remember that the protections they need go beyond the family law realm. A basic knowledge of estate planning is critical to educating and advising family law clients. Likewise, a basic understanding of family law is critical for the estate planner because the public policy underlying family law affects estate planning.

This Article goes back to the basics to consider foundational principles and statutes and how family law intersects with estate planning when the clients are same-sex couples. Part I addresses married couples and the estate planning basics these couples must consider. Part II addresses non-marital couples and what estate planning basics these couples must consider, though analyzing the surprising consistency of issues for same-sex couples regardless of

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

marital status. Part III addresses divorce and estate planning. Part IV addresses issues relating to children.

I. ESTATE PLANNING FOR MARRIED COUPLES

Goodridge was a landmark case. The power of having a state's high court proclaim the equality of same-sex couples under the law cannot be underestimated. The emotional benefit of being able to marry under state law is enormous. However, the practical benefits of marriage are less certain. This reality confounds clients who consult family lawyers prior to marriage. What benefits will marriage bring? The answers are surprising. Marriage carries significant benefits under the laws of the Commonwealth of Massachusetts in that it opens up access to inheritance rights, hospital visitation rights, burial rights, custodial rights to children, and rights to equitable division of marital property, alimony, and child support. The implications of the federal Defense of Marriage Act (DOMA) and questions regarding the portability of marriage mean that same-sex married couples still must work proactively to protect their families.² Marriage may be a good start for protecting a family, but it is not enough.

Marriage does impart a number of significant rights under state law. Parties to a same-sex marriage enjoy all the rights of different-sex married couples under Massachusetts law, and these rights are particularly powerful in the realm of estate planning. For instance, intestacy statutes ensure that a surviving spouse will receive at least a portion of the deceased's estate.³ Pursuant to Massachusetts General Laws chapter 190, section 1, if a person dies with kindred but no issue and the estate has a value of \$200,000 or less, the surviving spouse inherits the entire estate.⁴ If the estate is valued at over \$200,000 and there is no issue but there are kindred, the surviving spouse takes \$200,000 and half of the remaining estate.⁵ If there is issue, the surviving spouse takes one-half of the estate and

2. See 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

3. See MASS. GEN. LAWS ch. 190, § 1 (2006).

4. The intestacy statute does not define issue; however, the term "issue" has come to mean "all lineal (genetic) descendants," including "both marital and nonmarital descendants." *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 263 (Mass. 2002).

5. MASS. GEN. LAWS ch. 190, § 1.

the other half passes to the issue.⁶ If there is neither issue nor kindred, the surviving spouse takes the entire estate.⁷ Also, if a spouse dies intestate, the surviving spouse has priority to be appointed as the administrator of the estate.⁸

The statutory scheme described above also protects spouses in the event that the deceased spouse executes a will that effectively disinherits a surviving spouse. A surviving spouse can waive provisions of a will and instead take an elective share.⁹ If the deceased left issue, the surviving spouse can elect to take one-third of the personal and real property of the estate of the decedent;¹⁰ however, the survivor will only have a life estate and access to income of the estate.¹¹ If the deceased left kindred and no issue, then the surviving spouse takes \$25,000 outright and a life estate in one-half of the remaining personal and real property.¹² If the deceased left no issue or kindred, the survivor takes \$25,000 and one-half of the personal and real property outright.¹³ A surviving spouse can elect, in the alternative, to claim his or her dower interest in the real estate of the deceased spouse.¹⁴ A dower interest is the ability to claim a life estate in one-third of the real property held by the decedent at the time of death.¹⁵ These statutory provisions express the Commonwealth's public policy that marriage is a partnership and, even after death, spouses have a duty to support each other and cannot

6. *Id.*

7. *Id.*

8. MASS. GEN. LAWS ch. 193, § 1 (2006). Although these intestacy rights are important, they do not negate the need to contemplate and execute a thorough estate plan. For most couples, the wish is for the entire estate to pass to the spouse, who will benefit from the assets and ensure that the children, if there are any, are taken care of. The intestacy statute does not provide for this scenario and could leave the surviving spouse with fewer financial resources than the decedent intended or desired.

9. *See* MASS. GEN. LAWS ch. 191, § 15 (2006).

10. Interestingly, the estate of the decedent is defined differently in the context of the elective share than in the context of divorce. *See generally* Bongaards v. Millen, 793 N.E.2d 335 (Mass. 2003). The estate in the elective share context is limited to the probate estate and any inter vivos trusts created and controlled by the decedent; therefore, the estate in this context is much more limited than the marital estate used for equitable division of marital property. *See generally id.* There is agreement amongst the bar that the elective share statute is outmoded and in need of revision. *See id.* at 352.

11. *See* MASS. GEN. LAWS ch. 191, § 15.

12. *Id.*

13. *Id.*

14. MASS. GEN. LAWS ch. 189, § 1 (2006).

15. *Id.*; *see* 14C HOWARD ALPERIN & LAWRENCE D. SHUBOW, MASSACHUSETTS PRACTICE § 22.32 (3d ed. 1996) (noting that claiming a dower interest is infrequent because it is generally of greater value to the survivor to take via other options available, such as the will, intestacy, or elective share).

disinherit a surviving spouse.¹⁶ The legislature has limited the testamentary rights of spouses and has made it clear that one simply cannot disinherit a spouse.¹⁷

Massachusetts law contains special provisions for married couples beyond the orderly transmission of property and property rights upon death. Marriage provides significant protections in terms of hospital visitation, organ donation, and control over bodily remains. A spouse is considered next-of-kin and has the right of visitation in a Massachusetts hospital as well as the authority to consent to medical treatment if the other is incapacitated.¹⁸ A surviving spouse has priority over all others in determining whether to donate the deceased's organs if the deceased spouse has not already determined otherwise in a will or other writing.¹⁹ A surviving spouse has priority over all others in obtaining possession of the bodily remains of a deceased spouse.²⁰ If a deceased spouse has not determined by will where he or she wishes to be buried or interred, a surviving spouse has priority to determine where to bury or how to dispose of the bodily remains.²¹ Cemetery plots of spouses are exempt from the ordinary rules of conveyance and inheritance so that a surviving spouse may use a cemetery plot held by the decedent spouse to bury his or her own remains.²²

Despite the significant protections afforded under state law as a result of a valid marriage, these protections will not apply under DOMA and under the law of our sister states that have enacted some form of DOMA at the state level. As a result, it is critical that same-sex couples execute comprehensive estate planning documents, including a health care proxy, Health Insurance Portability and Accountability Act (HIPAA) waiver, living will, durable power of attorney, and will.

A. *Health Care Proxy*

Massachusetts General Laws chapter 201D authorizes the creation of a health care proxy.²³ A health care proxy empowers a

16. *See Bongaards v. Millen*, 793 N.E.2d 335 (Mass. 2003).

17. *L.W.K. v. E.R.C.*, 735 N.E.2d 359, 364 n.15 (Mass. 2000).

18. *See Shine v. Vega*, 709 N.E.2d 58, 64-65 (Mass. 1999).

19. MASS. GEN. LAWS ch. 113, §§ 8, 10, 12 (2006).

20. *See MASS. GEN. LAWS ch. 38, § 13* (2006).

21. *Vaughn v. Vaughn*, 200 N.E. 912, 913 (Mass. 1936); 1 CHARLES P. KINDEGRAN, JR. & MONROE L. INKER, MASSACHUSETTS PRACTICE § 16:10 (3d ed. 2002).

22. *See MASS. GEN. LAWS ch. 114, §§ 32, 33* (2006).

23. MASS. GEN. LAWS ch. 201D, §§ 1-17 (2006).

person, the agent, to make health care decisions on behalf of an individual, the principal, who cannot make or communicate health care decisions on his or her own.²⁴ The agent will also have hospital access and priority in medical decision making. Whether someone can make or communicate a health care decision is determined by an attending physician.²⁵ The health care agent's authority begins when it is determined "that the principal lacks the capacity to make or to communicate health care decisions."²⁶ When an attending physician determines that the principal has regained capacity to make and communicate health care decisions, the agent's authority to make those decisions ceases, and it is again the principal who must consent to the treatment at issue.²⁷ A principal may revoke a health care proxy at any time. By statutory design, revocation is a simple process; the principal simply must notify the agent or health care provider orally or in writing of his or her intent to revoke the proxy.²⁸ A proxy is also revoked by executing another proxy.²⁹ If the principal divorces, the entry of a judgment of divorce absolute revokes the proxy to the extent that the former spouse can no longer serve as an agent.³⁰

It is critical that married same-sex couples execute health care proxies, particularly if they travel out of state. Other states may not recognize same-sex spouses as next-of-kin, and designating a spouse as the health care agent clarifies that the spouse should make health care decisions in the event of incapacitation, regardless of jurisdiction. It is important to note, however, that health care proxy statutes may differ significantly in various states. If spouses spend a substantial amount of time in a state other than Massachusetts, those couples should consider executing a second health care proxy under the laws of the other state. Of course, both proxies should be

24. *Id.* §§ 1, 2, 4, 5. Medical decisions include decisions regarding physical and mental health. *See* *Cohen v. Bolduc*, 760 N.E.2d 714, 718 (Mass. 2002). It is important to note that the statute contemplates that the decision of the health care agent is not absolute. A family member, friend, or other person may object to the decision of a health care agent and seek to resolve a dispute in the Probate and Family Court. *See* MASS. GEN. LAWS ch. 201D, § 17.

25. MASS. GEN. LAWS ch. 201D, § 6.

26. *Id.*

27. *Id.*

28. *Id.* § 7.

29. *Id.*

30. *Id.*

consistent with one another so as not to create an additional level of complexity and confusion.³¹

B. *HIPAA Waiver*

An important companion document to a health care proxy is a limited waiver of the requirements of HIPAA.³² A health care agent needs medical information about the principal in order to make competent and rational health care decisions on the principal's behalf. Some medical professionals interpret HIPAA to prohibit releasing private medical information to a health care agent, absent an explicit waiver of HIPAA from the principal. Given HIPAA and society's concern with medical privacy, one must clearly waive medical privacy laws to ensure that a health care agent has unfettered access to medical information so that she or he can make informed health care decisions and can release health care information to the attorney-in-fact as needed. A HIPAA waiver is often a separate, stand-alone document that is in effect for a certain period of time, for instance, ten years.

C. *Living Will*

A health care proxy sets forth the person that a principal wishes to make health care decisions on his or her behalf; however, a living will sets forth what medical actions or decisions the principal wishes to be undertaken in the event that the principal is terminally ill or permanently unconscious with no expectation of recovery. A living will generally specifies whether life-sustaining treatments, including nutrition and hydration, are to be maintained if a person is in a condition where there is a negligible chance of returning to consciousness.³³ Massachusetts does not have a statute providing for living wills.³⁴ The health care proxy statute is intended to cover these types of decisions and enables health care agents to make all health care decisions, including the provision of nutrition and hydration, unless limited by the terms of the proxy.³⁵

31. It is also wise for clients to carry with them copies of their health care proxies, powers of attorney, and certificate of marriage, if applicable. Medical and other professionals may require documentation, and it is wise to ensure that these life-saving documents are on one's person at all times, particularly when traveling.

32. See 45 C.F.R. §§ 160, 164 (2007).

33. Massachusetts courts recognize nutrition and hydration to be medical treatment. *Guardianship of Doe*, 583 N.E.2d 1263, 1267 n.11 (Mass. 1992) (citing *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986)).

34. *Cohen v. Bolduc*, 760 N.E.2d 714, 719 n.12 (Mass. 2002).

35. 22 SEAN M. DUNPHY, MASSACHUSETTS PRACTICE § 44.3 (2d ed. 1997).

However, many attorneys advise clients to execute living wills as documents to inform the health care agent of the principal's wishes should a decision have to be made about continuing or terminating life-sustaining treatment. Furthermore, although living wills are not expressly authorized by Massachusetts law, living wills can provide evidence of a person's intent regarding life-sustaining treatments should a dispute arise, and such evidence is persuasive to a trial court making a substituted judgment determination.³⁶

D. *Durable Power of Attorney*

Another critical document is a durable power of attorney, which provides for continued financial decision making despite incapacity. A durable power of attorney is authorized under Massachusetts General Laws chapter 201B.³⁷ In this document, a person nominates an attorney-in-fact to act on his or her behalf in financial affairs and confers the ability to act despite the disability or incapacity of the principal.³⁸ The durable power must include the following language, or its equivalent, to be operational: "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal."³⁹ Any actions taken by the attorney-in-fact are binding on all parties involved in a transaction as if the actions were done by the principal.⁴⁰ In a durable power of attorney, a principal also can nominate a guardian or conservator.⁴¹ This is a very important provision and should be included in every document granting a durable power of attorney. At some point, even with a power of attorney, court intervention may become necessary. For instance, a court-appointed guardian may be necessary to administer certain medications. When a principal nominates a guardian or conservator, a court must defer to the principal's most recent nomination of such a fiduciary unless there is good cause not to do so.⁴² Considering who should be a court-appointed fiduciary in advance is preferable to having the court appoint a guardian or conservator who the principal would not desire.

36. *Doe*, 583 N.E.2d at 1267-68 (noting that one of the factors in a substituted judgment analysis is the patient's expressed preferences).

37. MASS. GEN. LAWS ch. 201B (2006).

38. *See id.* § 1 (internal quotation marks omitted).

39. *Id.*

40. *Id.* § 2.

41. *Id.* § 3(b).

42. *Id.*

A durable power of attorney can be present or springing in nature. A present power of attorney becomes effective at signing and remains effective indefinitely, but is intended for use only when the principal becomes incapacitated or designates that he or she wishes the attorney to act on his or her behalf.⁴³ A springing power of attorney becomes effective when a principal becomes incapacitated.⁴⁴ The benefit of a present power over a springing power is that there is no need to prove or demonstrate incapacity; therefore, the attorney-in-fact may move more swiftly to manage financial affairs. In general, it is advisable to have a present durable power of attorney. If one cannot trust his or her attorney-in-fact to act only when appropriate, then that person should not be an attorney-in-fact under any circumstances.

A durable power of attorney is a critical document for married and unmarried people.⁴⁵ With this document in place, institutions should recognize the authority of the spouse named as attorney-in-fact to handle the financial affairs of the incapacitated spouse. Whether the marriage is recognized should be irrelevant. Also, when advising couples who keep most of their assets separate, a durable power of attorney is essential to permit the use of the principal's funds during incapacity.⁴⁶ Funds may be necessary to secure nursing care, to make mortgage payments, and to ensure otherwise that the principal's needs are being met.

Generally, a power of attorney is revoked by death.⁴⁷ Death revokes a power of attorney when the attorney-in-fact has actual knowledge that death has occurred.⁴⁸ The Massachusetts statutory scheme does not, other than death, provide for revocation or termination of a power of attorney.⁴⁹ In other words, unlike a will or a health care proxy, a power of attorney is not revoked automatically by a judgment of divorce. One must proactively revoke a power of attorney by writing a new power of attorney or destroying the old

43. BLACK'S LAW DICTIONARY 1210 (8th ed. 2004) (defining "durable power of attorney" as "[a] power of attorney that remains in effect during the grantor's incompetency").

44. *Id.* (defining "springing power of attorney" as "[a] power of attorney that becomes effective only when needed, at some future date or upon some future occurrence, usu. upon the principal's incapacity").

45. RAY D. MADOFF, CORNELIA R. TENNEY & MARTIN A. HALL, PRACTICAL GUIDE TO ESTATE PLANNING § 3.04 (2007).

46. MASS. GEN. LAWS ch. 201B, § 4.

47. MADOFF, TENNEY & HALL, *supra* note 45, § 3:04[E].

48. MASS. GEN. LAWS ch. 201B, § 4.

49. *See id.*

one. A principal must provide actual notice of revocation or termination to the attorney-in-fact so that he or she knows that he or she can no longer act on the principal's behalf.⁵⁰

E. Will

The foundational document of an estate plan, familiar to most people, is a will. A will is a document that primarily serves to dictate the disposition of a person's probate property at death.⁵¹ A will also nominates a fiduciary to direct the disposition of the estate, directs what is to be done with bodily remains, and, if applicable, nominates a guardian for minor children.⁵² Any individual over the age of eighteen and of "sound mind" has the capacity to make a will.⁵³ In order to be valid, a will must be executed according to relatively rigid rules established by statute.⁵⁴ There are also statutory methods outlined for proper revocation of a will.⁵⁵ All individuals, even those with limited assets, should have a will as part of their estate plan, particularly parents of minor children.⁵⁶ Although a court is not required to appoint the guardians nominated in the will, a court will generally respect the choice of the deceased parent.⁵⁷ If there is no guardian appointed and no other legal parent, a court is empowered to appoint a guardian of its own choice.⁵⁸ When working with a married couple, it is important to advise the couple that marriage revokes a will unless the will includes language indicating that it was executed in contemplation of marriage.⁵⁹ As a result, if the partners already have wills that were

50. *See id.*

51. MASS. GEN. LAWS ch. 191, § 1 (2006); *see also* MADOFF, TENNEY & HALL, *supra* note 45, § 3:02. Nonprobate property, such as life insurance proceeds and jointly held property, passes as dictated in their governing documents and does not pass according to a will. *Id.*

52. *See* MASS. GEN. LAWS ch. 201, § 3 (2006) (empowering parents to appoint a testamentary guardian of a minor child); *id.* § 5 (noting that a surviving parent shall have custody unless proven unfit); MADOFF, TENNEY & HALL, *supra* note 45, § 3:02[A]. These statutes underscore the importance of adoption for same-sex couples. Without a legal relationship to a child, a parent does not enjoy these protections.

53. MASS. GEN. LAWS ch. 191, § 1.

54. *Id.* §§ 1, 2.

55. *Id.* § 8.

56. MADOFF, TENNEY & HALL, *supra* note 45, § 3:02.

57. *Id.*; *see also* MASS. GEN. LAWS ch. 201, § 5. The wishes of a decedent who nominates a guardian who is not the surviving parent will not be recognized unless the surviving parent is unfit or consents to the guardianship. *Id.*

58. *See* MASS. GEN. LAWS ch. 201, § 2; MADOFF, TENNEY & HALL, *supra* note 45, § 3:02[A][4].

59. MASS. GEN. LAWS ch. 191, § 9.

drafted prior to their marriage that were not executed in contemplation of marriage, those wills are of no effect.⁶⁰

F. *Prenuptial Agreements*

Another aspect of working with a same-sex married couple engaged in estate planning is an understanding of prenuptial agreements. It is critical at the outset to determine whether the couple has a prenuptial agreement. Massachusetts law expressly permits married couples to enter into a contract regarding marital rights and property prior to solemnizing their marriage.⁶¹ A prenuptial agreement determines rights and obligations not only upon divorce but also upon death. The rights described above, including the elective share, intestacy rights, and dower rights can be limited or waived altogether in a prenuptial agreement.

Most Massachusetts cases focus on enforcement of prenuptial agreements upon divorce.⁶² A court will enforce a prenuptial agreement that it finds was fair and reasonable at the time of execution unless "enforcement of the agreement would leave the contesting spouse 'without sufficient property, maintenance, or appropriate employment to support' herself."⁶³ This standard is a high one to meet, and the trend in Massachusetts is towards enforcement of prenuptial agreements at divorce.⁶⁴ It is likely that a similar analysis would be applied at death, leading to similarly strong enforcement of fair prenuptial agreements.⁶⁵ One unpublished Massachusetts case recognized and enforced a prenuptial agreement wherein a wife waived her right to claim an elective share.⁶⁶ In its analysis, the Superior Court of Massachusetts noted that a majority of states enforce prenuptial agreements at death.⁶⁷ If a couple seeking estate planning has a prenuptial agreement, it is

60. *See id.*

61. MASS. GEN. LAWS ch. 209, § 25 (2006).

62. *See generally, e.g.,* Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. 2006); Austin v. Austin, 839 N.E.2d 837 (Mass. 2005); DeMatteo v. DeMatteo, 762 N.E.2d 797 (Mass. 2002).

63. *DeMatteo*, 762 N.E.2d at 812 (citations omitted) (quoting 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 1.9 (2d ed. 1988)).

64. *See generally* Austin, 839 N.E.2d 837; *DeMatteo*, 762 N.E.2d 797.

65. *See* Collins v. Collins, 98 N.E. 588 (Mass. 1912) (enforcing in equity a prenuptial agreement wherein a wife waived all interest in a husband's estate for the sum of \$1000). *See generally* Rosenberg v. Lipnick, 389 N.E.2d 385 (Mass. 1979).

66. *See* Bickford v. Bickford, No. 97-1569-B, 1999 WL 33226458, at *8 (Mass. Super. Ct. Dec. 3, 1999).

67. *See id.* at *5.

important to review the agreement prior to taking the engagement or drafting any documents. It could be that the agreement's provisions make joint representation unethical. It could also be that the prenuptial agreement is largely irrelevant because it permits both parties to make dispositions freely via a will. Regardless, it is critical to inquire about existing prenuptial agreements and to contemplate how the agreements impact the estate plan.⁶⁸

II. ESTATE PLANNING FOR NON-MARITAL COUPLES

When an unmarried couple seeks legal advice about family law issues, it is critical to understand how to protect the family in the realm of estate planning and end-of-life transitions. The family's legal vulnerabilities are considerable, given the couple's unmarried status. An unmarried couple, regardless of the duration and commitment of their relationship, will not have access to the rights flowing from marriage.⁶⁹ Massachusetts does not recognize common law marriage.⁷⁰ To the contrary, Massachusetts has a strong public policy commitment to marriage as the foundation of family and as a social institution of great significance.⁷¹ The Supreme Judicial Court has repeatedly refused to *subvert* marriage by extending its benefits and obligations to unmarried cohabitants.⁷² Unmarried couples are generally regarded as legal strangers; therefore, they are vulnerable with regard to inheritance, property rights at death, and end-of-life decision making.⁷³

68. There is a new tendency towards drafting of postnuptial agreements as well, and it is wise also to ask about whether such an agreement exists or whether the couple intends to pursue such an agreement. Whether such agreements are enforceable is an open issue.

69. *See supra* Part I. All unmarried couples are vulnerable regardless of gender. Except regarding children, where unmarried same-sex couples are particularly vulnerable, unmarried couples of all sorts lack the benefits bestowed by marriage.

70. *Sutton v. Valois*, 846 N.E.2d 1171, 1175 (Mass. App. Ct. 2006) (citing *Collins v. Guggenheim*, 631 N.E.2d 1016 (Mass. 1994)).

71. *French v. McAnarney*, 195 N.E. 714, 715 (Mass. 1935).

72. *Sutton*, 846 N.E.2d at 1175.

73. *See generally* *Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975); *Northrup v. Brigham*, 826 N.E.2d 239 (Mass. App. Ct. 2005) (discussing equitable claims of an unmarried cohabitant after her companion died and failed to provide for her via will). In both of these cases, surviving unmarried cohabitants who were promised to be provided for by will were left to litigate equitable claims because they had no legal right to inherit from the decedent via the intestacy statutes.

When an unmarried partner dies without a will, the surviving partner will not inherit through intestacy statutes.⁷⁴ The unmarried person's estate passes first to the decedent's children and to the living issue of any deceased children.⁷⁵ If the decedent has no children or issue, the estate passes to the decedent's parents.⁷⁶ If the decedent has no living parent, the estate passes to the decedent's siblings and the living issue of any siblings.⁷⁷ In the absence of all others, the estate will escheat, which means it will pass to the state.⁷⁸ An unmarried partner is simply not included in any manner and will not inherit.⁷⁹

Because the statutory scheme does not provide for unmarried partners, an unmarried couple must act on its own to secure as many legal protections as possible through alternate routes. The unmarried couple protects itself in the same way as a married couple, namely, by executing a comprehensive estate plan that includes a will, health care proxy, living will, and durable power of attorney. The unmarried couple should also consider owning property jointly during their lifetimes by taking title to real property as joint tenants with rights of survivorship. In Massachusetts, a critical characteristic of joint tenancy is the right of survivorship.⁸⁰ When one joint tenant dies, title to the entire property automatically transfers to the surviving owner.⁸¹ No will or court intervention is required. The property never becomes part of the estate, but instead, by operation of law, the property passes to the surviving joint owner.⁸² It is important to note that the deed must explicitly state that the parties intend to take title as joint tenants.⁸³ In the absence

74. See MASS. GEN. LAWS ch. 190, §§ 1-3 (2006); see also *Northrup*, 826 N.E.2d at 240 n.3 (stating that the intestate's live-in companion, Betsy Northrup, did not inherit under intestacy statutes).

75. MASS. GEN. LAWS ch. 190, § 3(1).

76. *Id.* § 3(2)-(4).

77. *Id.* § 3(5).

78. *Id.*

79. It is possible for an unmarried partner to seek certain rights. For instance, if a dispute arises about a burial location or who has possession of remains, a partner can bring a complaint in equity in the probate and family court. A partner can also challenge a medical decision made by a family member. See MASS. GEN. LAWS ch. 201D, § 17 (2006). However, these options are options of last resort. They involve litigation that can be costly, protracted, and often lead to long-term family acrimony.

80. ALPERIN & SHUBOW, *supra* note 15, § 17:42.

81. See *Weaver v. City of New Bedford*, 140 N.E.2d 309, 310 (Mass. 1957).

82. Although property may pass outside of the probate estate, it may still be considered part of the taxable estate. This Article does not address tax issues, which must be considered as part of a detailed estate plan.

83. See MASS. GEN. LAWS ch. 184, § 7 (2006).

of specificity, the law presumes that two people, even married people, take property as tenants in common.⁸⁴ When one holds property as a tenant in common, upon death, the half owned by the deceased tenant descends as any other property of the estate—the property does not automatically pass to the other tenant in common.

It is also advisable for unmarried couples to hold some personal property jointly.⁸⁵ Parties may keep funds in a joint bank account that grants access to both of them.⁸⁶ However, the couple must understand that, with joint accounts, either party has the right to remove any or all of the funds at his or her discretion.⁸⁷ Upon the death of one owner, the other retains sole ownership of the remaining funds.⁸⁸ The funds do not pass by a will or intestacy.

Other than joint tenancies, unmarried couples should also ensure that nonprobate property—for example, life insurance policies and retirement accounts such as 401Ks—will be disposed of at death, pursuant to the decedent's wishes. Both partners should review the beneficiary designations on their policies and ensure that the designations are appropriate. This is crucial because these assets will pass automatically to the beneficiary and will not become part of the probate estate.⁸⁹

III. ESTATE PLANNING AND THE END OF A COMMITTED RELATIONSHIP

An estate plan should be reviewed on a regular basis to ensure that the documents provide for intended beneficiaries and to ensure that fiduciary appointments remain appropriate. The end of a committed relationship is a milestone that necessitates reviewing and amending estate planning documents.⁹⁰

84. *See id.*; 5 FRANCIS T. TALTY, PATRICIA SULLIVAN & ALAN L. BRAUNSTEIN, MASSACHUSETTS PRACTICE § 7:38 (4th ed. 2007) (explaining that joint tenancies are disfavored and that MASS. GEN. LAWS ch. 184, § 7, was enacted to reverse the common law presumption in favor of joint tenancies).

85. Holding title in joint name may have adverse tax consequences and should be done only after consultation with a tax advisor.

86. *See* MASS. GEN. LAWS ch. 167D, § 5 (2006).

87. *See id.*

88. *See id.*

89. *See generally* Foster v. Hurley, 826 N.E.2d 719, 729 (Mass. 2005) (noting that the deceased's probate estate was limited and imposing a constructive trust on life insurance proceeds that passed to a beneficiary in violation of a separation agreement).

90. Other triggers for a review include, among other things, an inheritance, the birth of a child, the death of a beneficiary, or simply the passing of a significant period of time.

For married couples who divorce, the laws of the Commonwealth of Massachusetts provide built-in protections to ensure that a former spouse does not take under a will or remain a fiduciary. The law presumes that former spouses should no longer have any right to the property of a deceased spouse, or any right to serve as a fiduciary to make critical decisions for the former spouse.⁹¹ When a judgment of divorce is entered, certain key revocations come into place by operation of law.⁹² Pursuant to Massachusetts General Laws chapter 191, section 9, divorce automatically revokes will provisions that benefit a former spouse. Pursuant to Massachusetts General Laws chapter 201D, section 7, divorce automatically revokes the appointment of a former spouse as a health care proxy.⁹³

It is important to note that neither serving a complaint for divorce nor a judgment on a complaint for separate support is sufficient to revoke provisions benefiting an estranged spouse, because neither of those events terminates the marriage. Therefore, during divorce proceedings, estate planning provisions benefiting an estranged spouse will remain in place. It is arguable whether a spouse can make comprehensive changes to an estate plan to remove all provisions benefiting an estranged spouse during divorce proceedings. It is possible that the automatic restraining order applies to estate planning and that both parties must maintain the status quo estate plan that was in place during the marriage.⁹⁴ This might be a

91. See, e.g., MASS. GEN. LAWS ch. 191, § 9 (2006); MASS. GEN. LAWS ch. 201D, § 7 (2006).

92. A judgment of divorce absolute is an operative judgment, not a judgment of divorce nisi. A marriage is not actually terminated until the judgment becomes absolute. *Ross v. Ross*, 430 N.E.2d 815, 819 (Mass. 1982). If a spouse dies during the nisi period, the former spouse will be entitled to take under the will and claim an elective share. See *id.*

93. The statute states, in relevant part: "A health care proxy shall also be revoked upon . . . the divorce or legal separation of the principal and his spouse, where the spouse is the principal's agent under a health care proxy." MASS. GEN. LAWS ch. 201D, § 7. Interestingly, revocation differs for will provisions and for health care proxies. It appears that a judgment on a complaint for separate support, which is the closest that Massachusetts comes to a legal separation, is enough to revoke the designation of a spouse as a health care agent. For a will, the status of husband and wife must be severed, and only a judgment of divorce absolute severs the marital relationship. See MASS. GEN. LAWS ch. 191, § 9; *Ross*, 430 N.E.2d at 819.

94. In a divorce matter, Massachusetts Supplemental Probate Court Rule 411 becomes effective for the plaintiff when a complaint for divorce is filed. The rule becomes effective for the defendant when the defendant is served with the complaint. Rule 411 enforces the financial status quo during divorce proceedings. Parties cannot transfer or use funds or change insurance policies and their beneficiaries except for under certain circumstances or with the permission of the other party or the court. MASS. SUPP. R. PROB. CT. 411 (2007).

sound argument with regard to property, but it is an unsuccessful argument with regard to fiduciary appointments. In other words, it might be appropriate to keep intact provisions regarding property, but it seems inappropriate to permit one's estranged spouse to continue to make important health care and financial decisions on one's behalf. If one is in the midst of divorce and wishes to make changes to an estate plan that involve property interests, it may be prudent to give notice to the other side and, if necessary, seek permission of a probate and family court. In the event that an estranged spouse dies during divorce proceedings and prior to entry of a judgment of divorce absolute, the survivor can still seek an elective share, even if the will has been changed.

When an unmarried couple ends a relationship, the protections afforded to divorcing couples, such as the automatic revocation of relevant portions of a will and health care proxy, are not available. An unmarried couple must be aware and active to ensure that an estate plan is properly amended after a separation. As discussed above, a judgment of divorce acts automatically to revoke will provisions that benefit a former spouse and appoint the former spouse as a health care agent. For unmarried couples, nothing is automatic. Unmarried couples must act consciously to revoke documents that include dispositions to or appointments of former partners. Failure to revoke these documents risks gifting property to a former partner when there is, in fact, no intention for that person to receive property. Even worse, unamended documents designating a former partner as a health care agent enable a former partner to make critical health decisions on the other partner's behalf. An unmarried person who has terminated a committed relationship should consult an estate planner, carefully review former documents, and either amend or revoke the documents as needed.

Regardless of marital status, at the end of a committed relationship, it is unwise to greatly disturb one aspect of the estate plan—provisions for guardianships of minors. At the end of a relationship, there is often a desire to nominate a person other than the child's remaining legal parent as a guardian. Although a custodial parent may feel strongly that the former spouse or partner is not emotionally attuned with the child following the end of a relationship, the former spouse or partner's role as legal parent must be respected.⁹⁵ When one legal parent dies, the other legal parent has

95. See MASS. GEN. LAWS ch. 201, § 5 (2006).

a right to custody of a child.⁹⁶ This may be true even if the surviving parent is estranged and has played little to no active role in the child's life.⁹⁷ Unless a parent is unfit, a parent has a right to custody of his or her child over all other claimants.⁹⁸ Proving unfitness is a very high bar. It requires a showing, by clear and convincing evidence, that a parent is currently unfit to further the welfare and best interests of a particular child.⁹⁹

After the end of a relationship involving children, it is important to consult with the former partner regarding guardianship provisions in a will to ensure clarity as to the appropriate care of children after the death of either partner. Each partner should nominate the other as guardian and, ideally, should agree on an appropriate successor guardian or guardians in the event of the death of both parents during the children's minority. Partners should discuss the importance of maintaining desired religious traditions and relationships with extended families, doing their best to put aside rancor and, instead, focusing on the children's best interests. In the best case scenario, agreements regarding guardianship will be articulated in a separation agreement so that the intent of the parties is clear and the parties have the benefit of discussing the issue directly.

IV. CHILDREN

Planning for the future financial security of children is the primary goal of many people's estate planning. While a parent is alive, the question is how to protect children during a period of parental incapacity. After the death of a parent, the questions become how to protect the children's property rights and how to ensure that the appropriate custodial arrangements are in place. The key to all of these issues is whether there is a legal relationship between the parent and the child.

Whether a couple is married or not, it is critical to establish a legal relationship between the child and both parents.¹⁰⁰ For mar-

96. *See id.*

97. *See* Guardianship of Estelle, 875 N.E.2d 515, 517-18 (Mass. App. Ct. 2007).

98. *See id.* at 518.

99. *See, e.g.,* Adoption of Nancy, 822 N.E.2d 1179, 1182-83 (Mass. 2005); Guardianship of Yushiko, 735 N.E.2d 1260, 1261-62 (Mass. App. Ct. 2000).

100. Of course, if the child is the product of a prior relationship, the family law issues are different. If the child already has two legal parents, the issue of establishing legal parentage in the new partner, if desired, is more complicated. A legal parent is distinguished from an equitable parent. For example, Massachusetts recognizes de facto parents. *See generally* A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006).

ried couples in Massachusetts, state law presumptions afford some rights and protections. However, for all same-sex couples, co-parent adoption remains critical because a judicial decree of adoption will be recognized as a valid determination of parentage by the federal government and sister states.¹⁰¹

In Massachusetts, children born within a marriage are presumed to be legitimate children of the married couple.¹⁰² This is true even when conception occurs through assisted reproduction and one of the spouses has no genetic relationship to the child.¹⁰³ The Massachusetts Registry of Vital Records and Statistics (Registry), the state agency that oversees and issues birth certificates, recognizes that the presumption of legitimacy applies to same-sex married couples.¹⁰⁴ The Registry, however, treats birth certificates of these children on a case-by-case basis. When a child is born to a same-sex married couple at a Massachusetts hospital, the hospital

A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999). A de facto parent may be entitled to visitation rights, if it is in the child's best interests, but it is unclear whether a de facto parent may also have rights to legal or physical custody. *See generally A.H.*, 857 N.E.2d 1061.

101. A valid decree of adoption, which is based on parents meeting adoption statute requirements, will likely be recognized by the federal government and other states. *See MASS. GEN. LAWS* ch. 210, § 2 (2006). The Tenth Circuit Court of Appeals recently struck down as unconstitutional an Oklahoma law banning state recognition of out-of-state same-sex adoptions. *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (“[F]inal adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause. Therefore, Oklahoma’s adoption amendment is unconstitutional in its refusal to recognize final adoption orders of other states that permit adoption by same-sex couples.”). With this statute stricken, it appears that all states will recognize same-sex adoption decrees from other states. *See generally, e.g., Schott v. Schott*, 744 N.W.2d 85, 88-89 (Iowa 2008) (stating the limited ways that an adoption decree can be attacked); *Russell v. Bridgens*, 647 N.W.2d 56, 59 (Neb. 2002) (giving full faith and credit to an adoption decree rendered in Pennsylvania). Some states such as Texas, however, refuse to issue new birth certificates after adoption of a child by a same-sex couple. *TEX. HEALTH & SAFETY CODE ANN.* § 192.008 (Vernon 2001) (restricting listing the parents on an adoptive child’s birth certificate to a man and a woman).

102. *See MASS. GEN. LAWS* ch. 46, § 4B (2006); *MASS. GEN. LAWS* ch. 209C, § 6 (2006).

103. *See MASS. GEN. LAWS* ch. 46, § 4B.

104. This registration differs based on the gender of the couple. *See cases cited infra* note 105.

submits the birth record information to the Registry for approval. Only after approval by the Registry is the birth record signed by the parents and forwarded to the Registry for finalization. The birth certificate obtained will list both spouses as parents. For a female-identified couple, the certificate will list mother and will cross out father and insert *second parent*. For a male-identified couple, the certificate will list father and will cross out mother and replace it with *second parent*.¹⁰⁵ For the purposes of state law, children born to married same-sex couples will generally be the legal, recognized children of that couple. Since the second parent is listed on the birth certificate by virtue of marital status, however, it is quite likely that other states and the federal government will not respect this document as reflecting legal parentage. Therefore, Massachusetts recognition of same-sex marriage is not enough.

For unmarried same-sex couples, only the biological parent will enjoy the benefits of legal parenthood of a child at birth. For female-identified couples, only the birth mother's name will appear on the birth certificate, unless the other partner has a genetic connection through egg donation.¹⁰⁶ For male-identified couples, only the biological father's name will appear on the birth certificate. Likewise, children of unmarried couples who adopt internationally will only have one legal parent at adoption. No foreign country permits lesbian or gay people to adopt, let alone couples. Many gay or lesbian people attempt to adopt internationally as single people. Until it becomes possible to pursue a co-parent adoption, the child will have only one legal parent. For these unmarried couples, a co-

105. For married male couples, the names on a birth certificate will depend on which assisted reproduction procedure was utilized. If the couple chose traditional surrogacy, where the birth mother is also the child's genetic mother, then it will not be possible for both fathers to appear on the original birth certificate. *See generally* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998). There, the surrogate will need to surrender her parental rights four days after birth, and an adoption will need to be finalized to amend the birth certificate to include the second father as a legal co-parent. *Id.* If the couple chose gestational surrogacy, where the birth mother gestates an egg from an anonymous egg donor, the couple should petition a probate and family court in equity to obtain a pre-birth order of parentage clarifying that they are the child's legal parents and that they should be listed as such on the birth certificate. *See generally* Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004); Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1137 (Mass. 2001). The couple will still need to complete an adoption post-birth because of the concern that other states and the federal government will not recognize a parentage order based on a Massachusetts marriage, but the carrier will not be on the birth record as a parent. A pre-birth order of parentage serves as a significant sign of intent should something happen to the legal parent between birth and adoption.

106. In this instance, the couple should seek a pre-birth equitable order of parentage to establish both their ties as legal mothers.

parent adoption must be completed. Pending the finalization of a co-parent adoption, unmarried couples should consider petitioning for permanent guardianship of the person and property of the child.¹⁰⁷ In the petition, the legal parent would consent to another adult, the same-sex partner, sharing guardianship of the child. The decree of co-guardianship permits the nonlegal parent to act as a parent for all purposes until the co-parent adoption can be finalized.¹⁰⁸ Guardianship will permit the nonlegal parent to make medical, educational, and financial decisions for the child and to enjoy custody rights to the child. It is important to note, however, that guardianship is not the equivalent of legal parenthood,¹⁰⁹ and an adoption is the desired route to establish both parties as permanent, legal parents.

For both married and unmarried couples with children, an adoption decree is critical to solidifying a universally recognized parent-child relationship. Establishing legal parentage is crucial because of the parental rights that are implicated when the other parent dies or when the adult relationship ends. The rights can be divided into two broad categories: property rights and custodial rights.¹¹⁰

Massachusetts and federal law establish certain property rights for children upon the demise of a legal parent. *Woodward v. Commissioner of Social Security* discusses the statutory right of issue to inherit from their parents and the definition of issue:

Section 1 of the intestacy statute directs that, if a decedent “leaves issue,” such “issue” will inherit a fixed portion of his real and personal property, subject to debts and expenses, the rights of the surviving spouse, and other statutory payments not relevant here. The intestacy statute does not define “issue.” However, in the context of intestacy the term “issue” means all lineal (genetic) descendants, and now includes both marital and nonmarital descendants.¹¹¹

107. See MASS. GEN. LAWS ch. 201, § 2 (2006).

108. See, e.g., *id.* § 4 (management of estate); *id.* § 5 (custody and education).

109. For instance, guardianships endure only until a child is eighteen. *Id.* § 4.

110. Providing for a child via a will is the surest route to ensuring that appropriate and desired dispositions of property occur. One can make binding determinations about property to children via a will. A will, however, cannot ensure that the proper custodial plan is in place for a child. For custody, establishing a legal relationship is critical because a legal parent will automatically have a right to custody of the child at the other parent's death.

111. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 263-64 (Mass. 2002); see MASS. GEN. LAWS ch. 190, § 1 (2006).

Adopted children are treated the same as biological children under intestacy statutes and have equal rights to inherit as issue of their adoptive parents.¹¹² In addition to these state rights to inherit the real and personal property of a legal parent, there are important federal property rights that arise from a legal parent-child relationship. The Social Security Act provides benefits to minor children of qualifying deceased parents.¹¹³ These state and federal property rights are critical to stabilizing the lives of children by providing some financial security following the death of a parent.

A legal parent-child relationship also bestows protections regarding care and custody. A legal parent has a fundamental liberty interest in the care and custody of his or her child.¹¹⁴ As a result, on the death of one parent, the remaining legal parent has the right to custody of a child. To deprive a parent of the right to custody, the parent must be determined to be unfit.¹¹⁵ A same-sex parent who has not adopted the child does not enjoy the presumption of maintaining custody of the child. Without this presumption and without a clear nomination of guardianship in a will, bitter custody disputes could arise between remaining family members of the deceased partner and the surviving partner.

No Massachusetts case has determined the rights of an equitable parent in relation to relatives of a deceased legal parent.¹¹⁶ It is likely that a probate and family court would have the jurisdiction to determine these competing rights in an equity action.¹¹⁷ Adoption would obviate the need for any litigation on this matter and is the desirable course for the family. Litigation can be lengthy, expensive, and destructive to family relationships, and it can result in the child being deprived of a continuing relationship with the person he or she views as a parent.

CONCLUSION

This Article raises a few issues to demonstrate the fundamental connection between family law and estate planning. In the realm of same-sex marriage, considerable gray area remains in both areas of

112. MASS. GEN. LAWS ch. 210, § 7 (2006).

113. See, e.g., 42 U.S.C. § 402(d)(1) (2000); *Woodward*, 760 N.E.2d at 260 n.3.

114. *Custody of Lori*, 827 N.E.2d 716, 718, 720 (Mass. 2005); *Guardianship of Estelle*, 875 N.E.2d 515, 516 (Mass. App. Ct. 2007).

115. *Estelle*, 875 N.E.2d at 517.

116. *But see id.* at 520-21 (suggesting that a legal parent may have to grant access to caretakers of a child who establish themselves as de facto parents).

117. See MASS. GEN. LAWS ch. 215, § 6 (2006).

law. It is important to advise clients to plan in advance, to review estate plans regularly, and to stay informed about changes in the law. Active planning with competent legal counsel will go a long way towards avoiding unintended outcomes and expensive litigation.