Safe Guarding Your Future: Challenges and Strategies to Unique Unmarried Couples and Singles

Individuals and unmarried couples facing the inevitable decline in health and independence associated with aging often face pitfalls that are far less likely happen to legally married couples. For the fact is that the common planning is geared towards the traditional "married with children" family life. Planning ahead can avoid many, though not all, of the problems that those of us living a non-traditional life may face. Unlike married couples, the unmarried couple preparing for a debilitating long term illness of one or both of them has none of the protections built into the law for the married couple. Even if you are in a same sex marriage, until your marriage is recognized on a federal basis, this disability will remain regardless of the availability of such marriages in some states. The financial assistance that may be provided to the ill partner for home care, nursing home or assisted living care provided by Medicaid (a federal and state program) does not allow for a portion of the couple's jointly held assets to be set aside for the use of the healthy partner.

Moreover, as a single heterosexual or an LGBT individual, in or out of a relationship, you are less likely than most to have a child or children to care for you in the event of a disability. And if you do have blood relatives, your healthy partner may find them to be hostile to the care giver, and seek to have control over the ill partner's care and assets transferred to the blood relatives by court order.

If you are the unprepared and unwary care giver to your unmarried partner, you may find yourself suffering unique problems ranging from financial disaster to being denied the right to care for, and ultimately, the simple right to carry out your partner's wishes with regard to disposition of his remains.

Jointly held assets.

Many heterosexual couples who choose not to marry, and same sex couples who cannot legally marry, seek to assure that their lifestyle and financial stability mirrors that of their married neighbors by choosing to title some, if not all, of their assets jointly. While this strategy works well to assure that the surviving partner has the sole right to joint assets in the event of death, in the event of disability this strategy can be devastating to the healthy partner's financial situation. There are other less risky strategies to assure your partner has access to assets during your lifetime and receives them upon death.

Jointly held assets have a myriad of problems. First, if your assets are held jointly, in the event that the ill partner needs care beyond that you as the care giver can provide, and his assets are inadequate to pay for them, any application for medical assistance will assume that all of the assets belong to the ill partner, without provisions to shelter a portion of the assets for the healthy care giver. If you have reached the point where the ill partner needs immediate assistance, this problem may be avoided to a degree by consultation with an attorney specializing in elder care whereby a portion of the assets may be sheltered.

Warning: In no event should you, as the care giver, or you, as the partner anticipating disability, attempt to rectify the situation by transferring a portion of your jointly held assets to your partner without legal guidance. For purposes of qualifying for public assistance an ill timed gift of your assets will disqualify you from receiving aid for a period of time commensurate with the amount of the gift. If you are both well and no disability appears imminent, you may consider dividing your jointly held assets well in advance of illness in proportion to your individual contributions.

Power of Attorney? Revocable Living Trust? Pre-need Guardian Designation?

Once you have disentangled your assets, or pro-actively, kept them separate in the first place, a revocable living trust is a very good way to achieve the same goals as jointly titled assets. When you place your assets in a trust, you are in control of the assets during your lifetime and so long as you have the mental capacity to handle them, and you can name your partner to be the successor trustee to take charge in the event of your death or disability. This allows you not only to be secure in the knowledge that your wishes will be carried out, but, also makes it highly unlikely that any of your blood relatives seeking to wrest control of you and your assets from your partner in the event of your disability will succeed.

Everyone should have a durable power of attorney for finances assuming that they have a spouse, domestic partner, friend, or relative on whom they can depend to manage their finances in the event that they should become unable to do so. That being said, the durable power of attorney can be voided by court order if you have motivated blood relatives who think they are more qualified than your chosen care giver to handle your finances if you become incapacitated. Many states have statutes on the books that deem any person "related to you by blood or marriage" to be preferred as your legal guardian over an "unrelated individual," even if he or she has been your domestic partner for years. In your state it may be possible for you to name your partner as your pre-need guardian or conservator and in that manner make it more likely that in the event of an incapacity proceeding your partner will be named as your legal guardian. That being said, if you have significant assets, or relatives you fear would interfere, by far the safest way to avoid trouble is to place your assets in a revocable living trust. It is very difficult to "bust a trust," and as a rule, pesky relatives are after your money, and really not all that concerned about who is doing the care giving.

What about the house?

While upon the disability of one partner jointly held financial and investment assets often pose an immediate concern, a jointly held homestead residence will be treated differently in most states. The healthy partner will likely be allowed to reside in the jointly owned home undisturbed, however, upon sale, or the death of the second partner, the state may seek to re-coup the financial assistance provided from the proceeds or estate of the second owner.

The jointly titled real property can become a real concern for the healthy partner in the event

that someone other than himself has been named the legal guardian (or "conservator" in some states) of an incapacitated partner. In that event, the guardian may be required to force the sale of the home in order to fund the care of the incapacitated partner. This would be accomplished by a partition lawsuit wherein a co-owner, or in this case, one acting on his behalf, can force the sale of jointly owned property to gain control of his equity interest in the property. Besides the fact of being ousted from one's home, in the event that the incapacitated individual contributed all or most of the cash to purchase the home, the healthy partner may end up with next to nothing.

Having a properly drawn and executed pre-need guardianship designation is insurance against this scenario, unless one of you are precluded from serving as guardian due to illness, or felony conviction, or lack of financial resources to fight the relatives legally. Again, if the ill partner's assets are in a trust: first, the relatives will probably not choose to pursue a guardianship proceeding when it's unlikely that they will be able to access the trust assets, and second, if they do, then, as trustee, you will have access to those assets to pay your lawyer.

Bits and pieces.

Everyone should have a health care surrogate designation (also called a medical power of attorney or medical directive.) However, in the case of the those unrelated by blood or marriage, it is crucial, because without it, you have no right to make medical decisions for your partner, or friend, if he is unable to act, and you may be denied access to him in health care facilities. (At this time, President Obama has, by administrative ruling, mandated that facilities receiving federal funds must provide unrelated persons, domestic partners, and same sex partners access to one another.)

Without a properly signed witnessed notarized writing a person unrelated by blood or marriage will have no right to dispose of another's remains without a court order. The health care paperwork should include the authorization to dispose of your partner's remains and act as otherwise necessary without further authorization of family or court.

In the event that you wish to have life support terminated in the event that your doctors have determined that you will not recover from your last illness, you should have a properly worded and executed document saying so. A living will, or advanced health care directive, is not necessarily a same sex issue, but, in the event that you wish your partner to be assured to have control of when each of the many levels of life support shall be terminated (e.g., cardiac resuscitation, ventilator care, tube feeding, chemotherapy, invasive procedures) your document should specifically put her or him in charge of decision making.

Everyone should do their best to seek legal advice from an attorney with specific knowledge and experience dealing with the problems unique to those of us living a non traditional life, that is, not married with children. That being said, the knowledgeable attorney may be difficult to find. The consumer is well advised to be armed with the foregoing simple facts that many attorneys unfamiliar with these unique problems all to often overlook.