

NON-TRADITIONAL FAMILIES, ASSISTIVE REPRODUCTIVE TECHNOLOGIES, AND COMMON CONCERNS FACING SAME-SEX ESTATE PLANNING CLIENTS POST-OBERGEFELL

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Many issues that faced same-sex couples prior to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which recognized the rights of same-sex couples to marry nationally, have been alleviated but some still remain. Moreover, laws regarding parental rights, adoption, heirship and property rights have not necessarily caught up with advances in science where one partner, or perhaps both, are not biological parents. Married, or not, unique issues remain for estate planning attorneys to explore when advising non-traditional clients. Just a few of these issues are summarized below.

I. Children, Issue and Heirs

Artificial Reproductive Technology (ART) has made it possible for infertile people and same-sex couples to have children. The use of donor sperm, eggs, embryos, and formal surrogacy are becoming more common. With each situation, establishing parental rights as well as heirship and property rights for the child may require additional thought or procedures.

a. Holding Out Presumption

As same-sex couples and others increasingly use ART and other methods, there is greater reliance on the "holding out presumption" which applies equally to all people. See, *In re Guardianship of Madelyn B.*, 166 N.H. 453, 501 (2014). The Court found both mothers were presumed parents based on the holding out presumption under the surrogacy law. See, *Id.*, See also RSA 168-B:3. However, the presumption is rebuttable, and may not stop the family of a pre-deceased partner from challenging the surviving partner's parental and guardianship rights.

Madelyn B highlighted the underlying issue that the presumption is rebuttable, but the Court has discretion based on the case facts to deny rebuttal. The presumption is established through conduct such as listing both partners on a birth certificate, holding the child out as their own in the community, being involved in school and medical decisions (which may involve obstacles), and otherwise maintaining contact with the child as a parent would.

b. Adoption

When at least one partner is not the biological parent, there are concerns over parental rights. Traditional adoptions terminate the parental rights of biological parents. In New Hampshire, step-partner adoption through RSA 170-B:4, IV(a) allows a non-biological parent to adopt a child without terminating the biological parents' rights. This important step eliminates many concerns surrounding the holding out presumption. In surrogacy situations, adoption can be started prior to birth and completed shortly thereafter. Adoption protects the parental rights of one or both parents and protects and defines heirship and property rights for the child.

II. Healthcare Decisions

Estate planners know the importance of an Advance Directive document but may not appreciate the increased importance for an LGBT individual.

LGBT couples, married and unmarried, may face difficulties not common with traditional heterosexual couples. Many LGBT individuals' limited/strained relationships with family often leads to disputes between natural parents and siblings, and the partner of the incapacitated individual. Establishing valid Advance Directives for LGBT clients, including HIPAA Release Authorizations, protects the people they choose as their agents, and respects desires to exclude hostile individuals.

III. Burial and Remains

An oft-overlooked statute, RSA 290:17, governs custody and control of remains. This statute allows a decedent to make a designation by a "written and signed document" describing who gets custody and control. Absent this document, the decision and custody falls to next-of-kin. Because many LGBT individuals associate more closely with chosen family, this document helps prevent disputes during an already difficult time.

IV. Last Wills and Testaments and Revocable Trusts

a. When it comes to Wills, guardianship provisions are especially important if adoption has not occurred.

b. With the increase of non-traditional families, definitions of “issue,” “child,” etc. within Wills or Trusts or other testamentary documents should be reviewed.

c. Stored genetic material like eggs or sperm are considered property of the decedent’s estate and should be dealt with in the dispositive provisions. Disputes over stored genetic material could result in donation to someone the decedent would not have intended donation, use by a surviving spouse against the wishes of the decedent, or inability to use the donated genetic material against the wishes of the decedent.

V. Post-Mortem Conception and After-born Issue Heirship and Property Rights in Wills, Trusts, and Intestate Succession

After-born children (and presumably posthumously conceived children) not named or referred to in the Will of a deceased parent are entitled to inherit as pretermitted heirs “after the decease of the testator”. NH RSA 551:10. See also, NH RSA 168-B:14. The New Hampshire Supreme Court recently determined RSA 551:10 does not apply to trusts. See, *In re Theresa E. Craig Living Trust*, 194 A.3d 967 (2018).

The New Hampshire Supreme Court also grappled with the issue in the context of Social Security Survivor’s Benefits because the ability to collect is dependent on intestate inheritance rights. The Court held a posthumously conceived child or after-born child would not inherit under intestate succession laws. See *Eng Khabbaz v. Comm’r, Social Sec. Admin.*, 155 N.H. 798, 802 (2007). The Court found looking at the statutory scheme as a whole “evinces a clear legislative intent . . . under which those who ‘survive’ a decedent—that is, those who remain alive at the time of the decedent’s death—may inherit . . .” *Id.* These results make it difficult to navigate heirship and property rights of an after-born child and require expressions of clear intent, especially in Trust documents.

VI. Conclusion

ART, LGBT and non-traditional legal issues can add complexity and uncertainty for estate planners. Questions about parental rights, spousal or partner rights, guardianship, property rights, reproductive issues, succession planning should be considered by practitioners, and discussed with their clients in the context of evolving statutes and common law.