

CONTRACTUAL VOWS

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As you begin another Monday morning, you look at your calendar for each day of the work week. As you review the entries, you see a memo from your assistant regarding two upcoming appointments. The memo reads as follows:

On Wednesday and Friday of this week, you have two unusual appointments. Because they are different from your typical appointments, I am writing you this memo so that you can think about and prepare for the appointments ahead of time. The Wednesday appointment is with a couple named Bob and Linda, who have lived together for five years. They do not have any children. They do not plan to have a traditional wedding or even obtain a marriage license. They have decided to cohabitate and are now considering buying real estate together. They are coming to see you for advice on how to hold the property.

The second couple you will see on Friday is Nancy and Sara. They have been together for eight years. They have two children. Each one of them carried one child through pregnancy. They used the same undisclosed sperm donor so the children are half-brothers. They are coming to see you for advice on co-parenting agreements and estate planning documents.

In order to prepare for the meetings, you determine that there are approximately 1,100 federal benefits of marriage that are not available to these two couple clients. Specifically, you determine that one member of the couple does not have certain rights and/or protections for the other member including:

1. Wrongful death claims;
2. Marital deduction for estate planning purposes;
3. Medical benefits;
4. Joint tax return filings;

5. Transfer of property without tax consequences;
6. Ability to hold property as tenants by the entirety;
7. Intestate succession;
8. Statutory share/allowances;
9. Elective rights;
10. Rights to qualified plans;
11. Tax reduction on the payment of qualified plans;
12. Social Security survivor benefits;
13. VA benefits;
14. Medical coverage continuation (COBRA);
15. Auto liability recovery;
16. Immigration privileges;
17. Family Medical Leave Act;
18. Taxed for domestic partnership health benefits;
19. They may be told that only “family” can visit if one of them is in the hospital;
20. They may be hospitalized together and denied information about each other;
21. Others will make medical decisions for them, other than their life partner;
22. They have no rights to live together in a nursing home;
23. Housing discrimination;
24. Child custody protection; and
25. Parenting time protection.

In preparation for both meetings, you identify three categories which you must address.

Those are:

1. Property;
2. Children of same sex couples; and
3. Estate Planning.

THE PROPERTY

With respect to the property, you have the following unanswered questions:

- a. Does one of them already own the property? If yes, do they have a mortgage and title insurance?
- b. If yes, is the other member of the couple buying into the property? If yes, what is the price? How was the price determined?
- c. Is the mortgage going to be refinanced to add the other member of the couple?

After meeting with Bob and Linda, you learn that they are considering two options:

(1) Linda will sell her current house and use the money from the sale to purchase a new home with Bob. Linda estimates that she will have approximately \$100,000 from the sale to put into a new home; or (2) Linda will keep the home and have Bob buy into the home at one-half (1/2) of the current appraised value. Because they have not yet reached a decision on either option, you give them some advice on the deed language and the mortgage.

THE DEED

You explain to them that because they are not married and are not considering marriage, they will not be able to hold the property as tenants by the entireties as such ownership is restricted for married couples only. *Scott v Grow* 301 MICH 226, 3 NW 2nd 254 (1942). With the elimination of this option, you discuss with them several other possibilities. Additional options of property ownership in Michigan include:

- a. Joint tenants not as tenants in common;
- b. Joint tenants with full rights of survivorship; or
- c. Tenants in common.

In selecting the deed language for this particular couple, their two concerns (like any other couple) are death and/or dissolution of their relationship. Because they want the property to pass to the other upon the death of one of them, you can easily rule out tenants in common because such ownership does not have any characteristics of survivorship. If they hold their property as tenants in common if a death occurs while they hold their property as tenants in common, and the deceased did not provide otherwise in estate planning, the interest of the deceased would pass to his/her legally defined family, not to the other member of the couple.

Having eliminated the option of tenants in common, you are now down to two choices, each of which have pros and cons. Both choices have survivorship qualities which would transfer the property to the other upon the death of one member of the couple. However, the difficulty of these two types of ownership is in the potential dissolution of the relationship. If they hold the property as joint tenants and not as tenants in common and a break-up of the relationship occurs, either one may file an action to partition the property or, if the property cannot be physically partitioned, that it be sold and the proceeds divided equally between them. If they hold it as joint tenants with full rights of survivorship and a dissolution occurs, the right of survivorship may not be partitioned.

THE MORTGAGE, TAXES and DOWN PAYMENT

You advise Linda and Bob that if Linda keeps her house and simply adds Bob to the deed, she must also add his name to the mortgage obligation or she may be in default of the mortgage. You further advise that in order to do so, she can refinance the existing mortgage. However, Bob will have to qualify for the mortgage based upon his income and payment history.

Since you are neither a lender nor a banker, you refer them to several local banks for prequalification discussions.

You also explain to Linda and Bob that the person who deducts the mortgage interest is obligated to pay the interest. Further, that if he buys into the house it must be for fair market value or it may be considered a gift. You also advise that adding someone to the deed may result in uncapping the value of the property for property tax assessment purposes and that there will be a transfer tax. Finally, if one of them puts money toward a new house, any agreement regarding a credit for the down-payment should be in writing.

THE CHILDREN

Nancy and Sara have two sons and they want to make sure that in the event of the dissolution of their relationship, each will have shared custody, parenting time, and child support obligations. You advise them that because they are living in Michigan, such rights may not be available, since neither is the biological mother of the other child. However, they want to enter into a co-parenting agreement that provides that in the event of the dissolution of their relationship, they will share joint physical and joint legal custody of their children, that each will have 50/50 parenting time so that the children will spend the majority of their time together, and they want to use the Michigan Child Support Formula for purposes of calculating child support. After you advise them that such an agreement may not be binding, they still insist on having something in writing. You agree to prepare the contract to include a mediation and/or arbitration clause to resolve any disputes potentially outside of the Court system.

While you are discussing the details of the potential agreement, you inform the couple of a recent case from the Supreme Court of California entitled *Elisa B., Petitioner v Superior Court of El Dorado County, Respondent* Ct. App 3 C042077. In that case, two women involved in a domestic partnership agreed to raise their children together. Their children were born during the relationship through one partner's artificial insemination using an anonymous donor, resulting in

twins. Testimony indicated that the parties began their relationship in 1993, exchanged rings, opened a joint bank account and believed that they were in a committed relationship. Both discussed having children and decided that because one of them earned more than twice as much as the other, that the non-primary wage earner would be the stay-at-home mother. After several unsuccessful attempts at pregnancy, the designated stay-at-home partner became pregnant in February, 1997, and gave birth to the twins in March of 1998. Both parties jointly selected the children's names, joining their surnames with a hyphen to form the children's surnames. The primary wage-earner named the children as dependents on her tax returns and obtained a life insurance policy naming her partner as the beneficiary, so that if anything happened the children would be cared for.

Upon the dissolution of the relationship, the primary wage-earner denied any financial obligations for the twin children. The lower Court found that the primary wage-earner partner was obligated to support the twins under the doctrine of equitable estoppel. The Appellate Court concluded that the primary wage earner of the relationship was the presumed mother of the twins because she received the children into her home and openly held them out as her natural children. Further, the Court held that she was obligated to financially support the children because she actively participated in their conception, she voluntarily accepted the rights and obligations of parenthood after children were born, and there were no competing claims to her being the children's second parent.

ESTATE PLAN

You learned from your interview with Nancy and Sara that they are very concerned that the other remain the parent of both children if one of them dies. You also learned that they currently do not have any estate planning documents. As a result, you advise them that they should immediately obtain for each other the following documents:

- Financial Power of Attorney effective upon disability
- Medical Power of Attorney effective upon disability
- Appointment of Medical Advocate
- Acceptance of Medical Power of Attorney Duties
- Wills with Guardianship and Conservatorship language
- Medical Power of Attorney for each parent over the children

CONCLUSION

You conclude after all of your research and your meetings with the client that non-traditional families require non-traditional planning because they have contractual vows. In order to ensure that you have provided appropriate advice, and prior to drafting any documents, you decide to seek advice from another member of the Bar with expertise in issues regarding non-traditional families. I look forward to your call! Connie Thacker of Rhoades McKee (616) 235-3500.