

FOR GAY/LESBIAN CLIENTS

Family & estate legal planning

By Carol Ann Fey

As families evolve in American society, and more clients establish families outside of legally-recognized "marriage," or "non-traditional families," legal and financial planners must rethink traditional family and estate planning tools to ensure we properly serve the different needs of these clients. For purposes of this article, the term "non-traditional family" consists of two unmarried partners of the same gender, with or without children. Of course, many of these thoughts extend similarly to male/female unmarried partners. This article is intended to share highlights of some of the legal issues that gay/lesbian families must address in their family and estate planning. Future articles will focus on these topics in more detail.

Estate Planning Issues

When we really think about it, the execution of wills and other planning documents is extremely important for gay/lesbian clients who form life-partnerships/families. The state's legislated backup estate plan (the statute of descent and distribution), simply does not address the "families of choice" created by these clients. In the absence of validly executed wills and other legal documents drafted to accomplish the client's desires, couples who spend many years in a committed relationship in which they may commingle funds, buy real estate and other property, and incur debt, eventually face a probate system that does not take the relationship into account and may create serious financial problems for the survivor.

Gay and lesbian clients, particularly those who form families with partners (with or without children), really require legal documents that carefully and specifically express and describe their estate plans. These documents must include a will that seriously anticipates the possibility of a will contest initiated by relatives who are either already hostile to the client's relationship, or who may not be openly hostile to the relationship during the client's lifetime but whose hidden disapproval surfaces after the client's death.

The will should be careful to deal with jointly owned property and debt, acknowledge and take into account relationships with children, and include terms for guardianship of any minor children, if any. It is, unfortunately, not unusual for a parent to finally learn of (or be forced to acknowledge and deal with) the real nature of a child's relationship to a life-partner only after

the child dies, and this time of grief and stress is, of course, a particularly difficult time for both the surviving partner and the family of the deceased partner to experience confusion or conflict over these issues.

When drafting wills and other planning documents, it is important to keep in mind that some standard estate planning terminology may not be adequate or appropriate for these situations. Taken a step further, when the gay or lesbian partner's parents do make their wills, they may presume that their "grandchild" is legally connected to their child, when in fact the legal connection may exist only between the grandchild and the biologic or adoptive parent. A client with grown children who are unmarried may well have a grandchild he or she loves and would choose to include in an estate gift, but the use of generalized terms such as "to my grandchildren, in equal shares" will omit that grandchild due to the lack of actual legal relationship.

Planning tools should include a durable health care power of attorney (which may name the partner or friend as the decisionmaker, rather than a parent or sibling); a living will including designation of that partner or friend as the person to be notified; the nomination of the partner to serve as the client's legal guardian if the client needs one in the future; careful preparation of documents to protect the client's designation of the partner to continue as guardian or ongoing legal custodian of children of the relationship; possible use of general durable powers of attorney for financial management; and a document designating the partner as the person entitled to take possession of and make decisions concerning the client's remains at time of death.

The planner should also explore the appropriate use of survivorship deeds for real estate, joint/survivor checking and savings accounts, pay on death accounts, transfer on death auto titles, and a review of beneficiary designations to ensure they are up to date and coordinated with the client's will provisions.



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Some clients may be fearful of discrimination that could result from disclosure of identity as gay or lesbian as the result of naming a partner as beneficiary of employee life insurance benefits, IRAs, pensions and retirement benefits, or income deferral accounts. For those clients, the planner should consider a short-term testamentary trust provision to provide a "neutral" beneficiary to receive insurance proceeds for distribution to the partner, while avoiding the negative tax consequence that result from designating the estate itself as beneficiary.

Where a client or the client's life-partner has children, it is crucial to learn who has legal connection to the children, and the nature of any understandings or agreements about joint parenting plans. We must discard traditional assumptions, and think creatively, analytically, and expansively. A client may have a child that resulted from a former marriage or other relationship; a client may have jointly adopted a child with a same-gender partner in a state that legally authorizes such joint adoptions; a woman may have used a sperm donor whose legal rights and obligations have not been extinguished in the insemination process; a man may have adopted a child, or may be legally related to a child having used a surrogate biological mother to bear a child to whom he is also biologically connected. In all of these situations, the parent may have a partner who is jointly parenting the child but who lacks legal connection – it would be devastating to a child to not only lose a parent through death but also to lose the child's second parent through lack of basic legal planning.

Family Planning Issues

In Ohio and many other states, when unmarried partners have a child, only one of the partners is legally connected to the child (by birth or adoption), but the other partner may well be considered by both partners and the children to be a second parent. These clients should be counseled to consider establishing joint custody of their children during their lifetimes, to protect the relationship between the second (not legally connected) parent and the child whether the relationship is torn by breakup ("divorce"), or by the death of the related parent.¹ In

Bonfield the Ohio Supreme Court ruled that gay/lesbian parents were not entitled to adopt "shared parenting plans" because such plans are established in domestic courts under those sections of family law that relate to children of marriages; rather, gay/lesbian parents may establish joint custody relationships under similar statutory provisions applicable to juvenile courts.

Even gay/lesbian couples without children should be careful about the legal rights and responsibilities they undertake when they commingle funds, purchase real property (whether jointly or separately), incur joint debt (or incur debt for joint plans but only in one partner's name). Ohio's family courts do not have jurisdiction to deal with property disputes between gay / lesbian couples at time of "divorce."

When meeting with clients, we need to start by asking the right questions designed to identify the needs and desires of our clients. Most new client forms and many interviews are not user friendly for gay / lesbian clients. They may not invite information regarding whether or not an unmarried client may have a family that does not fit the traditional married formulas for which much of estate planning is designed. An assumption that gay / lesbian clients will tell us directly who they are and make their needs known is not adequate. Some clients who consider themselves permanently partnered (and who would likely be married if it were legally possible), will do their estate planning individually, and present at first glance as an unmarried individual.

Because there is no terminology that consistently or accurately describes partners that cannot legally marry, wise planners should develop a sensitivity to recognizing and exploring more neutral-sounding relationship labels. A reference to a partner, for example, may mean a business partner or life-partner or perhaps something else. A client who lives with a "friend" may consider that friend to be the equivalent of a spouse. Unless the planner conducts an interview designed to glean the importance of the unmarried client's relationships with the friend or partner (or other terms), the planner may unintentionally lead the client to feel uncomfortable with disclosing the nature of his or her relationships, which can in turn lead a client not to follow-up on initial plans, or to believe that the client's only legal estate planning options involve gifts to legally recognized relatives such as parents, siblings, etc.

The preparation of family and estate planning documents for gay/lesbian clients requires sensitivity and creativity. This planning provides an opportunity and obligation for critical reassessment of our standard planning documents, and in some cases, the opportunity to expand our understanding of client family relationships, all with an eye toward meeting the ever-changing needs of our clients.



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¹ See *In re Bonfield*, 97 Ohio St.3d 387 (2002).

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