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Gay & Lesbian Couples Face Special Challenges In Estate Planning

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GAY & LESBIAN COUPLES FACE SPECIAL CHALLENGES IN ESTATE PLANNING

Prepared by the Estate Planning Group at Walker Lambe Rhudy Costley & Gill, PLLC
And the American Academy of Estate Planning Attorneys

According to the Gay and Lesbian Association of Retired Persons, there are more than three million gays over the age of 50 in the United States today. As with the general population, those numbers are expected to explode over the next few decades with the maturing of the Baby Boomer generation.

And, while gays have made important strides in industry, employment, and in recognition as a market to be wooed by advertisers, the law has lagged behind in providing equality for gay couples in committed relationships.

In this report, you'll learn why the right to privacy and personal control over health care and distribution of assets are key reasons for gay and lesbian couples to consider a Living Trust as their estate planning vehicle of choice.

Unequal Under the Law

In particular, states have historically failed to recognize gay marriages. In 1996, there was an early success in Hawaii when a court found that the state failed to show a "compelling legal interest" to ban gay marriage. However, that decision was rendered moot by an amendment to the state constitution before any same-sex marriages could be performed in the state. In the intervening years, a few states, including California and Vermont, moved forward to provide same-sex couples rights similar to marriage with "civil union" and domestic partnership laws.

In 2003, the Massachusetts Supreme Judicial Court ruled that the state could not discriminate against gay couples seeking to be married in the state. The court specifically ruled that civil unions would not be sufficient and that only marriage would suffice. The court paraphrased the U.S. Supreme Court's landmark ruling in *Brown v. Board of Education*, declaring that "in our history separate is rarely, if ever, equal."

In spring 2008, the California Supreme Court followed the lead of Massachusetts and held that same-sex couples had a right to marry. Thousands of same-sex couples were, in fact, legally married in California before voters approved an initiative ballot measure, Proposition 8, which amended the state constitution to deny same-sex couples the right to marry.

The legal landscape is still rather complicated, however. In 1997, Congress passed the Defense of Marriage Act, which permits the federal government and each of the states to deny legal recognition of a gay marriage performed in any state. It is not clear whether this statute is constitutional under the "full faith and credit clause" in the United States Constitution.

In addition, it is not clear whether the U.S. Supreme Court might find that laws prohibiting gay marriage are unconstitutional. That court, in *Lawrence v. Texas,* held that laws prohibiting consensual, private, same-sex relations were unconstitutional. Language in the opinion seemed to indicate a shift on the court against discrimination based on sexual orientation in general.

Clearly, the legal landscape is shifting rapidly. There are new challenges and new risks. While things seem to be moving in the right direction at present, it is unclear if the backlash will overwhelm forward momentum.

Consequences for Effective Estate Planning

The current denial of equal status for gay couples has serious consequences for those who want the same benefits heterosexual married couples receive in wisely planning their estates. For example, married heterosexual couples can pass their assets tax-free at death to their spouse because of the Unlimited Marital Deduction, a device for preserving the assets of a marital relationship. Gay and lesbian partners do not have this protection, even if they are in a California domestic partnership, a Vermont civil union, or legal marriage in Massachusetts.

There are other estate planning issues of particular importance to gays and lesbians. Suppose one partner has failed to do the estate planning necessary to make certain that the other partner is protected. Assets may instead be divided up among blood relatives, whether they recognized and supported the relationship or not. Then there is the matter of HIV. Though medical science has recently made significant strides in longevity for HIV patients, there remains the strong possibility that an HIV-infected person can become disabled or incapacitated. Without proper planning, the person infected with HIV could have a conservator or guardian appointed by the court to govern his or her affairs, instead of a life partner or trusted friend. Fortunately, there is an alternative. It's called a Living Trust.

How a Living Trust Works

When you set up a Living Trust, you transfer the title of all of your major assets, including stocks, bonds and real estate, from your name to the name of the Trust. You then name yourself as the Trustee and beneficiary. While you are alive, you control your assets completely, as you do now. At death, however, your assets are the property of the Trust. This means they can be distributed only according to the terms set forth in your Trust document. A Living Trust is an effective way to plan your estate because it ensures that your wishes are carried out. For example, if a Trust is funded and administered by a professional Trustee so that it's in operation years before death, it will be more difficult to challenge than a Will. A long history of operation provides a track record supporting the Trustor's intentions. A Living Trust can also be used to help preserve wealth. That's why a Living Trust is the estate planning vehicle of choice for partners regardless of their sexual orientation. Another key reason many turn to a Living Trust is to avoid a process called probate, which is Latin for "prove the will."

A Word About Probate

Many people mistakenly think that if they have a will prepared they will avoid probate. This couldn't be farther from the truth. Every Will must be admitted to probate. Once the probate process begins, your estate is no longer solely controlled by your partner or family because the court will be involved in administering the estate. You lose privacy as probate records are public records. Biographers of Jacqueline Kennedy Onassis, for example, spent countless hours in the record archives of New York State, combing through her Will and list of inventoried assets for details about her private life. In addition, the probate court can approve an executor and appraisers, all of whom will expect to be paid out of the proceeds of the estate. The result is that there is less available to be distributed to your partner and loved ones.

Finally, probate can mean a delay of up to a year or more in distributing your assets to your loved ones, particularly if your biological family members do not consent.

Creating a Living Trust

The right to privacy and personal control over health care issues and distribution of assets are just some of the reasons gay and lesbian couples should consider a Living Trust as their estate planning vehicle of choice. Creating a Living Trust and tailoring it to your unique needs requires the help of an estate planning attorney who is familiar with the needs of gays and lesbians. To avoid the disadvantages of probate, seek out an attorney who emphasizes Living Trusts. Evaluate how well the attorney listens as an indication of how attentive he or she will be to your individual situation.

Choose an attorney with whom you can feel comfortable sharing your hopes, dreams and fears. Creating a Living Trust is an intensely personal experience. Your attorney should have sensitivity about the issues gays and lesbians face as partners and couples and be able to resolve them in a way that will leave you lasting peace of mind. The attorneys at Walker Lambe Rhudy Costley & Gill, PLLC have extensive experience in the area of estate planning. Our attorneys have helped countless clients establish Living Trusts to suit the needs of their unique families. Not only are we well-versed in estate planning techniques and issues, but our attorneys are well-acquainted with the particular concerns of gay and lesbian clients. Call our office to set up an appointment to address these issues with one of our attorneys.

About Our Law Firm

The law firm of Walker Lambe Rhudy Costley & Gill, PLLC is dedicated to providing a professional and personal legal advice to its clients. Whether a client seeks legal advice for personal and family matters such as estate planning or family business exit or transfer planning, for business affairs such as corporate formation, planning, finance, or real estate development, for the affairs of a foundation or other nonprofit organization, or for coordination of dispute resolution, Walker Lambe is ready to serve all of your needs as legal counsel.

The Estate Planning Group of Walker Lambe has helped Triangle area individuals and families with estate planning and administration for more than twenty-five years. It is what we do, and our practice reflects this experience. Working with Walker Lambe means that now and in the future, you and your family will be served by a dedicated team of attorneys and professionals. From simple Estate Plans to sophisticated tax and financial planning and the structuring of complex estate plans incorporating Wills, Trusts, and Charitable Trusts and gifting plans, Walker Lambe offers you and your family a personal legal counsel for all of your needs. Your goals may be to plan for retirement, to provide for the continuation of a family business, to provide for a member of the family who is disabled, to plan for the education of children and grandchildren, the establishment of a private foundation to further the charitable goals of the family, or to plan or apply for Veterans' or Medicaid benefits. In all events, Walker Lambe provides the highest qualify of legal services, tailored to individual needs and with a sensitivity to cost. We will help you understand the issues, advise you regarding your options, help you define your goals, and counsel you regarding family circumstances or financial matters that present unique challenges.

How To Contact Us

Our main office is located in the Palladian Corporate Center at 240 Leigh Farm Road, Suite 100, Durham, North Carolina 27707. We also have an office in Chapel Hill in Southern Village at 102 Market Street, Suite 105, Chapel Hill, North Carolina 27516.

For more information about the services that we offer, or to schedule a comprehensive and personalized Estate Planning Consultation, please visit our website at www.walkerlambe.com *or call us at 919.493.8411.*