

Estate Planning for Same-Sex Married and Unmarried Couples: Latest Developments

Optimizing Estate, Tax and Family Planning Opportunities
in Recognition and Non-Recognition States

TUESDAY, JULY 9, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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STRAFFORD PUBLICATIONS

ESTATE PLANNING STRATEGIES FOR SAME-SEX AND UNMARRIED PARTNERS

Tuesday, July 9, 2013

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Columbia, and Virginia.*

Overview of Implications of U.S. Supreme Court Decisions in *Hollingsworth v. Perry* & *Windsor v. United States*

- Federal Employees
- Immigration
- Military
- Families with Children
- In General
- In Recognition and Non-Recognition States

How To Create Parent/Child Legal Relationships For Same-Sex Couples With Children

- 1) By Parents' Legal Relationship
- 2) Adoption
 - Joint Adoption
 - Second- Parent Adoption
- 3) Birth Certificate
- 4) Pre-Birth Orders
- 5) Parentage Actions
- 6) Joint Custody Orders/ Conservatorships
- 7) Assuming Parental Role
 - De Facto Parent
 - Equitable Parent
 - Parent by Estoppel
 - Psychological Parent
 - In loco parentis Theory
- 8) Legal Documents
- 9) Ethical Issues

ESTATE PLANNING STRATEGIES FOR SAME-SEX AND UNMARRIED PARTNERS

**OPTIMIZING ESTATE TAX SAVINGS AND INHERITANCE RIGHTS
AND PREPARING FOR MEDICAL AND END OF LIFE DECISIONS**

TUESDAY, JULY 9, 2012

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ESTATE PLANNING DOCUMENTS

GENERAL CONSIDERATIONS:

- In most states, in absence of estate planning, partners will have no rights to inheritance, medical or financial decisions, or to oversee funeral arrangements.
- How should partners be identified in DOMA non-DOMA states?
- Is there a need to disinherit & exclude family members?
- Planning is necessary not just for potential family challenges, but also for institutional uncertainty
- How should no contest clauses be used
- Inclusion of children's trusts and guardianship in absence of adoption
- One method to provide intent: Execute new Will every year
- Estate tax strategies for same-sex couples – how do they differ
- Should partners use the same attorney? Ethical considerations

ESTATE PLANNING DOCUMENTS

ALL ESTATE PLANS FOR SAME-SEX COUPLES SHOULD INCLUDE:

Last Will & Testament

Directive to Physicians (Living Will)

Medical Power of Attorney

- Address visitation
- Presidential Memo: Patients at nearly every hospital in the country will now be allowed to decide who has visitation rights and who can make medical decisions on their behalf regardless of sexual orientation, gender identity or family makeup -- under new federal regulations that took effect January 2011.

HIPAA Release of Authority

- A HIPAA release should be included as a separate document or within Medical Powers of Attorney or Directives to ensure access to medical records and information.

Durable (Financial) Power of Attorney

ESTATE PLANNING DOCUMENTS

- **Declaration of Adult Guardianship**

- Allows adults to designate one or more individuals to be his or her guardian if s/he is declared incapacitated or incompetent. In many states, if a guardian is appointed, Medical and Financial Powers of Attorney are null and void; therefore, it is critical to complete this document so that the right people are making decisions under all circumstances.

- **Appointment of Agent to Control Disposition of Remains**

- Allows one to specify one or more individuals to be in control of funeral, burial, cremation arrangements. Can also authorize organ donation and autopsies. This document also allows one to specify wishes regarding such arrangements.

LIVING TRUSTS

PROS

- Assists in managing your affairs
- Protects your privacy
- Easy to create and change
- Avoids probate (maybe)
- Avoids potential guardianship
- Harder to challenge (maybe)

CONS

- Cost
- Title problems
- Complicated to administer
- Still need a WILL
- Won't affect non-probate assets

COORDINATING NON-PROBATE ASSETS

- **The lists includes: Life Insurance; Retirement Plans; IRAs; and Annuities.**
 - Can name partner/spouse
 - These assets or accounts have named beneficiary designations that control the distribution at your death.
 - Without a living named beneficiary, the asset will pass to your estate and be governed by your Will, assuming you have one.
- **Beneficiary Designations**
 - Person
 - Trust
 - Estate

COORDINATING NON-PROBATE ASSETS

- **Bank and Brokerage Accounts**
 - Joint Owners
 - Right of Survivorship
 - TOD (transfer on death) or POD (payable on death)

You may find that most of your estate consist of non-probate property.

COHABITATION AGREEMENTS

- To guarantee the financially less secure partner an equitable settlement.
- To properly compensate a party for his or her role as a caretaker.
- To allow the financially more secure party to limit exposure in the event of a breakup.
- To disclose expectations of the relationship, both financial and personal.
- Distributing property in case of death or breakup.
- Obligating financial support during the relationship or upon its dissolution.
- Handling the payment of debts.
- Dividing the principal residence upon breakup of the relationship or if one of you dies.
- Defining support, custody or visitation rights for minor children (although nonbinding).
- Specifying health insurance coverage.

NAME CHANGE AND GENDER ORDERS

NAME CHANGE FOR SAME SEX PARTNERS:

- **Have same family name**
- **Standard for granting**
- **Legal Effect**

NAME & GENDER CHANGE FOR TRANSGENDER:

- **State law on gender changes**
- **Birth certificates**

Importance of Full Faith and Credit

- Found in Article IV, Section 1 of U.S. Constitution
- Duties that states must recognize “public acts, records and judicial proceedings of every other state” *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 494 (2003), quoting *Baker v. General Motors*, 522 U.S. 222, 232 (1998).
- Federal statutory law provides that: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. § 1738.
- Laws: Public Policy Exceptions
- Judgments and Court Orders: No Public Policy Exception

Adoption

- **Definition:** “The creation of a parent-child relationship by judicial order between two parties who are usually unrelated.” Adoption “creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges, and responsibilities that attach to that relationship.” Blacks Law Dictionary (8th ed. 2004).
- **Basis of Adoption**
 - Was virtually unknown at common law
 - Adoption is a creature of statute
 - Adoption is governed by state law

Adoption

- Joint Adoption

- Most state laws provide that a husband and wife may jointly petition to adopt, but do not explicitly provide for joint adoption by other couples.
- Some state laws do allow joint adoption by same-sex couples. See for example, D.C. Code 16 – 301 et. seq.

Adoption

- Second Parent Adoption
 - Definition: “an adoption by an unmarried cohabitating partner of a child’s legal parent, not involving the termination of a legal parent’s rights.” Black’s Law Dictionary (8th ed. 2004). Although not all states recognize or allow second-parent adoptions, the practice is becoming more widely accepted.
 - Particularly important if a same-sex couple separates

Adoption

- Crucial in guaranteeing that full faith and credit will be given to the non-legal parent's parental status.
- Without second parent or joint adoption a legal parent (either a birth parent or a current adoptive parent) may prevent a non-legal parent from continuing a relationship with the children of the couple.
- Second parent adoptions or a similar proceeding is available in California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Vermont, and Washington
- Others - county by county in Alabama, Arkansas, Delaware, Hawaii, Louisiana, Maryland, and Michigan

Adoptions

- Indian Child Welfare Act
 - Congress enacted ICWA in 1978. The act stated, “...it is the policy of this Nation, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing assistance to Indian tribes in the operation of children and family service programs.” 25 U.S.C.A. §1902.
 - Must be considered when either one or both of the child’s natural parents is from a recognized Indian tribe. In a case where the child has enough of a blood quantum to be considered part of the tribe (each tribe is different as to how much Indian blood they require the child to have), ICWA will apply (*i.e.*, the tribe will have jurisdiction over the adoption, as opposed to the state).

Birth Certificates

- Birth Certificates
 - By itself, a birth certificate does not create a legal relationship between the parents named on the birth certificate and the child. However, many clients believe that to be the case.
 - Crucial for clients to obtain a second parent adoption
 - Post-adoption: state where the child was born is required to issue a new birth certificate with both names of the adoptive parents, including same-sex couples. There has been significant litigation around this issue, and to date, every state refusing to issue such a birth certificate has lost.
 - But, 5th Circuit Case, Adar v. Smith (April 12, 2011).

Pre-Birth Orders

In Relation to Surrogacy

- Prior to the birth of a child, a gay male couple may be able to obtain a pre-birth order, declaring that they are each the parent of the child. Both names will appear on the child's birth certificate at the time of birth and the surrogate's name is not placed on the birth certificate. A pre-birth order is important for full faith and credit purposes, but a second-parent adoption, if available, may be a safer option.

Children Born to Lesbian Couples

- Lesbian couples may be able to obtain a pre-birth order prior to the birth of their child. In some jurisdictions where second-parent adoptions are not available, a pre-birth order may be available.

Parentage

Parentage Statutes

- Married Couples
- Couples in Civil Unions
- Couples in Domestic Partnerships
- Couples signing documents intending to raise children together

Parentage Actions

Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005)

- Presumed parents because held out as such.

Shineovich v. Kemp, 214 P.3d 29 (Or. App. 2009)

- Woman who consents to partner's insemination can be a legal parent under the Uniform Parentage Act.

District of Columbia Parentage Act of 2009 amended several statutes through the Domestic Partnership Judicial Determination of Parentage Act of 2009 ("the Parentage Act")

- Provides parentage rights to non-birth mothers in same-sex relationships

D.C. Parentage Act

- The laws, as amended, allow for women who are in a same-sex domestic partnership or marriage to be entered on the birth certificate of the child as the parents of the child. D.C. Code § 7-205(e) (2001), as amended
- Additionally, if there is no established legal relationship between the women but both intend to parent the child, they can execute a Consent to Parent in order to have both parents listed on the child's birth certificate. D.C. Code 7-205(e)(3)(B) (2001), as amended
- Known sperm donor has no parental rights unless written agreement that he does

Joint Custody Orders

- **In lieu of Adoption** – for jurisdictions that do not allow same-sex adoptions, such as Virginia
- It is not uncommon for gays and lesbians in Virginia to share joint legal and physical custody over their children.
- Petitions for custody and visitation are filed in Juvenile and Domestic Relations Court. With few exceptions, most matters are not open to the public.
- The case of Denise v. Tencer, 617 S.E. 2d 413 (Va. 2005) supported the position that if the biological parent agrees to an order conferring custodial rights on another person, for whatever reason, (it may or may not be because they are committed partners in a same-sex relationship), the other person gets elevated status and has the continued right to be involved in the child's life.
- Downside: No parallel rights and responsibilities

* Thanks to Margo Owen, a Virginia practitioner in Fairfax, Virginia, for this information

Parentage by Assuming Parental Role

- De Facto Parent, Equitable Parent, Parent by Estoppel, Psychological Parent, *In loco parentis* theory
- Based on person assuming a parental role in child's life. Right to seek visitation or custody.
 - Arizona, Colorado, Connecticut, Delaware, District of Columbia, Indiana, Kentucky, Maine, Minnesota, Montana, Nevada, Oregon, South Carolina, and Texas
- DC De Facto Parent Statute
- DC Code § 16 – 831.01, et. seq.
- Factors: Lives with child, held out as parent, assumed parental role and responsibilities, acquiescence by legal parent, formed a parent-child relationship

Documents Providing Protection for Couples with Children

- **Last Will and Testament**
 - Guardian of a child can be named in a Will, and in most instances, the decedent's wishes will be followed. Where a second-parent adoption is not available, at a minimum a parent can name his or her partner the guardian of the child upon the legal parent's death
- **Designation of Standby Guardian**
 - Many states have statutes allowing a parent to name a “standby guardian” in the event of the parent's physical or mental incapacity. A legal parent should execute such a document to give his or her partner parental rights in these circumstances, if a second-parent adoption is not available. *See, for example*, MD. Code Ann., Est. & Trusts § 13-904.

Documents

- **Temporary Guardian and Power of Attorney for Minor**
 - Prior to a second-parent adoption, or if a second-parent adoption is not available, the legal parent should execute a document giving the other parent authority to make medical and other decisions for the child.
- **Co-Parenting Agreements**
 - Prospective parents should execute a Co-Parenting Agreement, particularly when a second-parent adoption is not available. Although it is unclear whether such an agreement will be upheld by a court, the agreement is important evidence of the parties' intent.

Ethical Issues

- Joint Representation of Couple
- Waivers
- Retainers
- Affidavits
- Separation – no representation of either party
- Mediation – working with both parties

National Resources

1. **National Center for Lesbian Rights**, www.nclrights.org – Up-to-date analysis of cases and issues, publications and downloads for practitioners, advice to attorneys
2. **Human Rights Campaign, Family Project**, www.hrc.org – Resources for clients, also comprehensive overview of state laws, including adoption and surrogacy
3. **Lesbian and Gay Law Notes**, www.nyls.edu/centers/harlan_scholar_centers/justice_action_center/publications/lesbiangay_law_notes – Monthly publication with details of cases, legal events, and law review articles from the entire country
4. **Lambda Legal**, LambdaLegal.org – Descriptions of its cases
5. **ACLU**, www.aclu.org/lgbt-rights - Descriptions of its cases
6. **Freedom to Marry**, www.freedomtomarry.org – General information
7. **Family Equality Council**, www.familyequality.org – General information
8. **Bar Websites** – These websites often have standard forms available that comport with state law

POST DOMA Estate, Tax and Financial Planning for the LGBT Community

Stafford Publications Seminar

July 9, 2013



Deb L. Kinney, Esq.

- Deb L. Kinney is the principal of DLKLawGroup, PC, a law firm providing comprehensive and competent estate planning, trust administration and probate services. The planning practice covers a broad spectrum from foundational estate planning to wealth transfer to charitable planned giving and to providing guidance and services during trust administrations and probates for estates and represents beneficiaries.
- Deb has a B.A. from University of California at Berkeley, a J.D. from New College School of Law, is a member of the California State Bar Trusts and Estates Section, the Bar Association of San Francisco and the American Bar Association. Deb served for many years on the Board of Directors of Horizons Foundation and Equality California and is now on the Tides Advocacy Fund Board.
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Overview of Session

- Income and Estate Tax changes
- Benefits
- Retirement planning
- Gifting, Wealth transfers, title to assets
- Divorce and other considerations for advisors

Perry v. Hollingsworth

- Federal court / Boies and Olson
- Prop 8 unconstitutional
- No further standing by uninterested parties
- Marriages resumed June 28th, 2013

Impact of Windsor Case

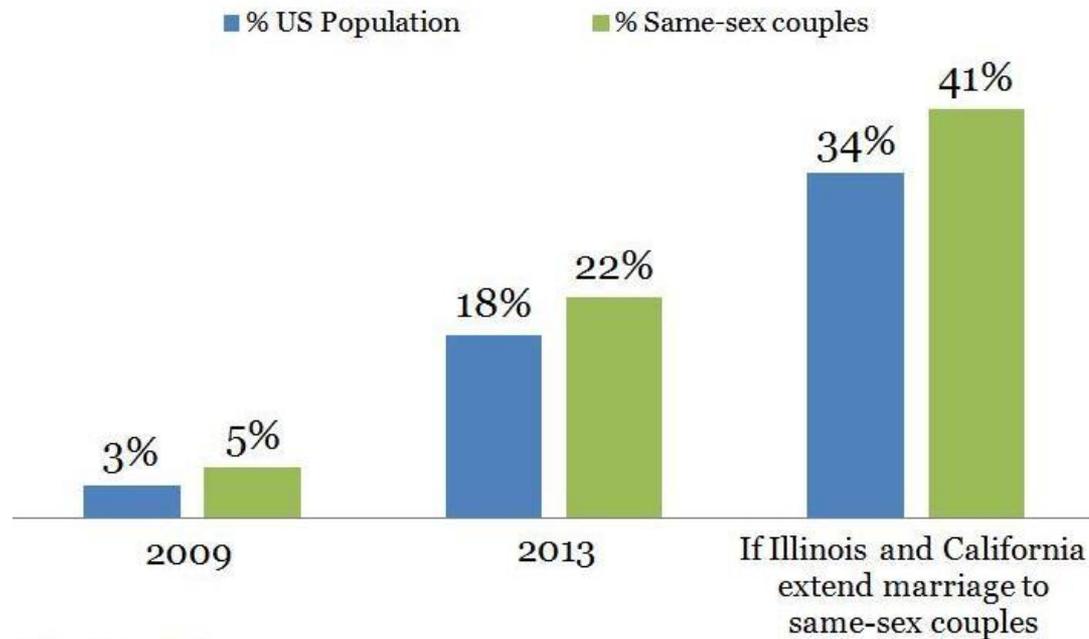
- Changed the world as we know it
- True for whom?
- Marriage jurisdictions and reciprocity
- Planning now for the future

Same-Sex Families

- Not Legally Related
- Married in a jurisdiction that recognizes marriage
- Registered Domestic Partners
- Civil Unioned
- Married and Registered/Civil Unioned

More than 1 in 5 same-sex couples live in states where they can marry; Compared to 1 in 20 in 2009

Percent of U.S. Population and Same-sex Couples Who Live in States with Marriage Equality



Source: Census 2010

Legal Rights for LGBT Marrieds!

- Legal rights under federal law- 1138 rights
- Income and estate tax implications
- Financial planning considerations

Changed Tax Rights for LGBT Marrieds!

- Married for tax filing status --potentially higher taxes in CA, WA, NM and potentially lower in non Community Property states
 - Dependent no more
 - HOH no more
 - Marital deduction
 - Health insurance benefit not taxable
 - Adoption credit limited for spouses

Income Taxation for LGBT Married Couples!

- Joint filings
- Self employment tax
- Partial years for residency
- IRS has not issued guidance
- Tax Equity Project
www.lgbtbar.org/tax-equity-project

Income Taxation for LGBT Married Couples!

- Capital gains exclusion on sale of primary residence
- Offset losses and gains
- Roth IRA contribution limits
- Medicare and Social security tax

World changes overnight!

- Federal benefits and rights
 - Immigration
 - Social Security
 - Bankruptcy
 - Federal Employee benefits
 - Medicare/MediCal
 - Pension and Retirement benefits
 - Protected Communications
 - Veteran benefits
 - Benefit qualifications (ADAP etc)
 - *But, CAUTION!!!!!!! Will place of celebration or place of residence govern benefit?*

Medicare– Marriage Matters!

- If not married, must sign up by age 65
- Does not matter if on partner's insurance
- Medicaid qualifications equivalency
- Recovery and Liens

How Does Your Practice Change?

- Need to know relationship status of client and know that it will change
- Spousal waivers on beneficiary designations
- Separate and community/marital property analysis still important
- Analysis for retirement dependent on place of domicile or status?

Estate planning

- If they are married, treat them as married
- If there is a state estate tax, plan for it
- Portability may not be so great
- GST planning
- Inheritance Rights
- Community Property – double step up
- Protective claims

Estate and Financial Planning Considerations

- Social security retirement and survivor benefits
- Joint lifetime for annuities
- Qualified disclaimers
- Pension benefits
- Spousal rollovers vs inherited IRAs
- Joint tenancy presumption by IRS

How To Talk To Clients About Marriage

- Tail should not wag the dog
- First time many have ever considered possibility of marrying
- Planning for divorce – new definition of wedlocked

Why Estate Planning for Same Sex Families Is Still Different

- Lack of uniformity creates complexity
- Benefits will differ for foreseeable future
- Lack of understanding on clients' part
- Institutional bias and unfamiliarity
- Presumption of marital deduction and recognition for portability etc

Documents Everyone Should Consider

- Health care directives/ HIPPA releases
- Hospital visitation authorization
- Powers of attorney for financial management
- Wills
- Living trusts
- Advanced estate planning/ Tax Planning

Revocable Living Trust for Married Same Sex Couples

- One Trust or Two or Three and why
- Transmutation for Step up in Basis
 - Divorce vs. death
- Update now or later
- ATRA- portability or bypass or disclaimer

Tax Planning Issues to be Considered for Planning

- Unlimited marital deduction
- Divorce as non taxable
 - Out of state property transfers
- Portability, QTIP, and foreign spouse rules
- Titling and ownership
- Powers of appointment
- Community liability

Beneficiary Designations Should be Updated

- IRA's/ 401(k)'s/ 403(b)'s/
- Pensions
- Life Insurance
- POD or TOD Accounts

DLKLawGroup PC provides estate planning trust and probate administration services to individuals, families and business owners. DLKLawGroup has the expertise to assist with wealth transfer, charitable giving, entity formation, and has a dedicated elder law practice. We provide these services for the Spanish speaking community as well.

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