



# Estate Planning for Gay and Lesbian Couples

BY KATHIE J. GUMMERE  
& MICHAEL J. TUCKER

**Kathie J. Gummere:** ARIZONA ATTORNEY has asked me to submit an article on sex. The editors seemed to think that this topic would pique the interest of the readership.

**Michael J. Tucker:** A revolutionary approach.

**Kathie:** Yes. I thought I would focus on estate planning for gay and lesbian couples. Want to help?

**Michael:** Sure. But they probably won't want to print it.

**Kathie:** Don't be silly. ARIZONA ATTORNEY is committed to raising awareness among attorneys about corners of law practice that people haven't necessarily thought about.

**Michael:** Oh, well, why didn't you say so? When it comes to unmarried couples, there's definitely a lot about estate planning that lawyers may not have considered.

**Kathie:** You said unmarried couples. But I want to talk about gay and lesbian couples.

**Michael:** From a legal standpoint, there is typically no difference between the relationship of a same-sex couple and the relationship of an unmarried opposite-sex

couple.

**Kathie:** What's the big deal about unmarried couples? Their estates can't be that complicated, can they?

**Michael:** Well, Kathie, actually, more planning is needed for unmarried couples, because they can't take advantage of the safety nets that are in the law for married couples.

**Kathie:** Like what?

**Michael:** The intestacy laws, for starters, not to mention guardian/conservatorships, and medical decision making. And, of course, the adoption laws. Community property law. Income tax law. You name it. The issues come up more often that you would think. These days, more people than ever are living together who are not married.

**Kathie:** You mean there are people who are in ... meretricious relationships?

**Michael:** Don't make it sound so ... well ... PRURIENT. We're not talking Will and Grace here. Unmarried couples are chauffeuring their kids to soccer practice and taking care of their aging parents, just like the rest of us. Their loved ones need

protection in the event that they become incapacitated, or if they die unexpectedly.

**Kathie:** Naturally.

**Michael:** Here's a quiz. If a married man dies without a will, who inherits?

**Kathie:** His widow, of course. Or if it's a second marriage, then his widow and his children from the previous marriage share in the estate.

**Michael:** Right. But what if the decedent was not married to his beloved. Who inherits? And what if he is incapacitated? Whom will the court appoint as his guardian and conservator?

**Kathie:** I see your point. Unmarried couples don't have the automatic protections under the law that married couples enjoy.

**Michael:** Now you're getting the idea. And unmarried couples perhaps need the legal protections more than married couples, who enjoy a kind of carte blanche in navigating through society.

**Kathie:** What do you mean?

**Michael:** Let's say you are incapacitated, and I go around town trying to conduct transactions on your behalf.

**Kathie:** I'm not sure I like this example.

**Michael:** Let's assume you have named me the holder of your power of attorney. Even though I have a piece of paper giving me authority to act on your behalf, I assure you that I will be greeted with suspicion at banks and title companies all over town.

**Kathie:** Go on.

**Michael:** But if you and I were married ...

**Kathie:** ... the ceremony would be fabulous.

**Michael:** Yes ... well, and apart from that, if you and I were married, and if you were to become incapacitated, I would probably be able to handle most of your financial affairs during your incapacity, even without a power of attorney. That's *carte blanche*.

**Kathie:** Inequality again. So let's talk about the intestacy laws. I take it that you are saying that unmarried couples are somehow disadvantaged by them.

**Michael:** Well, the intestacy laws exist as a default mechanism so that there will be an established order for the distribution of estates of persons who die without having executed a will. Arizona's intestacy laws, like those of most jurisdictions, make no provision for the unmarried domestic partner of a decedent.

**Kathie:** Isn't that the law everywhere?

**Michael:** Things are changing. In California, a surviving domestic partner is entitled to a share of his or her deceased domestic partner's estate, even if there is no will, but only if they were registered as domestic partners with the state.

**Kathie:** That's a lot better than inheriting nothing!

**Michael:** Everyone should still execute a will. However, the California extension of intestacy law protections to domestic partners is a first step at giving unmarried couples the same legal safety net that married couples enjoy.

**Kathie:** I have heard a lot about gay marriage lately. Is that what you're talking about?

**Michael:** Massachusetts is the only U.S. state to actually legalize same-sex marriage. Various other states have had short periods of issuing marriage licenses. The legality of most of those marriages is in doubt. Portland, for instance, issued marriage licenses for a couple of months, and marriages were performed pursuant to those licenses. Although their legality has been challenged, and a trial court stopped the issuance of any more licenses, the trial judge did declare the marriages performed were legal. Of course, that decision is now up on appeal.

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## Will couples be recognized as married in one state, but not in another? What happens when a couple is legally married in their home state and then moves to a state that doesn't recognize that marriage?

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**Kathie:** And I have heard that other countries are contemplating either full marriage or at least extension of rights to registered couples. I guess this is one area where the United States is not leading the pack. When couples are married in other states and/or countries, such as Massachusetts or Canada, it could be a legal mess when they come back to the United States or their home state, right? What will the states do then?

**Michael:** Who knows? Some states have laws specifically stating that marriage is only recognized when it is between a man and a woman. Of course, there is that

pesky full faith and credit provision of the U.S. Constitution. This controversy should bring lots of business to family lawyers and probate litigators.

**Kathie:** Will couples be recognized as married in one state, but not in another? What happens when a couple is legally married in their home state and then moves to a state that doesn't recognize that marriage? And how will all this affect pension plans regulated by ERISA, in light of a state-sanctioned marriage and the federal Defense of Marriage Act? And what about social security? It really does sound as if it will be messy for quite awhile.

In the meantime, let's talk about adoption.

**Michael:** Many American jurisdictions allow unmarried couples to adopt. Also fairly common are laws permitting someone to adopt his or her unmarried domestic partner's child. Some of those laws include gay and lesbian couples, while others do not. Arizona's adoption laws don't draw a distinction between straight and gay people in unmarried domestic partnerships. In Arizona, only a married couple or a single person can adopt.

**Kathie:** Are co-parent adoptions in one state recognized in other states?

**Michael:** Usually; however, the states are still unclear. This is another area for litigation. Good thing there are lots of lawyers looking for clients.

**Kathie:** What about when the domestic partnership falls apart? Doesn't one of them get palimony?

**Michael:** You refer to the Arizona progeny of the *Marvin v. Marvin* case. As in that case, the Arizona cases have allowed palimony-type recoveries based on a contract theory. It can be difficult to prove. It's certainly not analogous to the statutory basis for spousal maintenance in the event of the dissolution of a marriage.

**Kathie:** Well, I hope at least it's not complicated for the former domestic partners to unravel their jointly held property. Those divorce settlements can be so unpleasant.

**Michael:** Actually, unraveling a domestic partnership can be just as messy. If there is real property involved, and if the joint owners can't agree on how to dispose of it, the remedy is a partition action in superior court. And proving who contributed what and when can be a nightmare.

**Kathie:** How awful. How can that be avoided?

**Michael:** One way for the happy couple to minimize the risk of problems is to enter into a domestic partnership agreement.

**Kathie:** How does that help?

**Michael:** It's kind of like the opposite of a prenuptial agreement.

**Kathie:** And we know how popular those prenuptial agreements are.

**Michael:** Oh, just give me a chance here. A prenuptial agreement seeks to limit, or even eliminate, the rights that marriage will confer on the prospective spouse.

**Kathie:** Eliminate all rights? I see that you've gotten hold of a copy of my prenuptial agreement form. That's what happens when one person has lots of money and is planning on getting married in a community property state like Arizona, right? What's mine is mine and what's yours is mine.

**Michael:** Very funny. The domestic partnership agreement is the reverse of the prenuptial agreement, because the domestic partnership agreement seeks to confer rights on the domestic partner where no such rights would otherwise exist.

**Kathie:** So let's see if I've got this straight.

**Michael:** Pun intended?

**Kathie:** Of course. You're saying that the prenuptial agreement restricts the rights of the spouses in each other's property, while the domestic partnership agreement expands the rights of the domestic partners in each other's property.

**Michael:** Exactly. Each is like a property settlement agreement that is negotiated and executed while the lovebirds are still getting along.

**Kathie:** You're so romantic.

**Michael:** Some people may criticize the community property laws as anachronistic or unsophisticated. At least they create a framework for the respective property interests of divorcing spouses to be divided. In the case of unmarried couples, inadvertence in how the property is titled often leads to unintended results when the property is divided.

**Kathie:** Like what?

**Michael:** Well, it would be typical for an unmarried couple to hold title to a home as joint tenants, even though one of them may be making the down payment, paying the monthly mortgage and paying for insurance and repairs, while the other is paying only for utilities. But as joint tenants, their rights in the property are co-extensive while they hold the property. And if they terminate their relationship ...

**Kathie:** You mean, if they break up?

**Michael:** Right. Then the partition law provides that each of them must prove up his or her contribution to the property so that the division of the proceeds of the sale of the property can be determined.

**Kathie:** What a mess.

**Michael:** Exactly. And that's just about the time when one of them files for bankruptcy court protection.

**Kathie:** (wincing) Ouch! Let's talk about something else.

**Michael:** How about taxes?

**Kathie:** You really know how to liven up an interview.

**Michael:** Bear with me. Unmarried couples really aren't much worse off than married couples, at least in the area of income taxes.

**Kathie:** The IRS spares no one.

**Michael:** Married couples get to file joint income tax returns, but the applicable tax rates are actually higher than for two unmarried persons filing separately.

**Kathie:** Also, the laws for claiming dependents for income tax purposes do

not hinge on the marital status of the taxpayer or the dependent.

**Michael:** That's true. Just about the only income tax area that's a lot better for married couples than everyone else is the area of inheritance, pension and IRA distributions after death. Widows have a lot more flexibility and more options to postpone the payment of income taxes on inherited pension accounts and IRAs than any other beneficiary.

**Kathie:** Many people have gotten a rude awakening when they realize the tax burden on an IRA they inherited from a domestic partner.

**Michael:** However, being married is a boon for estate tax purposes. If you're going to leave a vast inheritance to someone, be sure to marry him or her first.

**Kathie:** Is that because of the estate tax marital deduction?

**Michael:** That's right. It's unlimited!

**Kathie:** And so are the possibilities for this interview topic. But I think I had better go back to the office now and review my unmarried clients' estate plans.

**Michael:** Let me know if I can help. After all, I answered all your questions, didn't I? ▲

*Kathie J. Gummere is a sole practitioner in Phoenix who limits her practice to estate planning and government affairs and is also a registered nurse. She spends much of the legislative sessions lobbying for the Arizona Human Rights Fund on gay, lesbian, bisexual and transgender issues.*

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