

SOLO

Vol. 13, No. 1

LAW OFFICE INFORMATION FOR SOLO & SMALL FIRM PRACTITIONERS

Estate Planning *for Same-Sex Couples*

Estate planning for same-sex couples is a significant untapped market for lawyers that demands creativity to ensure clients are properly protected. Contrary to stereotype, not all lesbians and gay men are independently wealthy—most are squarely in the middle class—requiring that same-sex couples take

additional steps to preserve their assets.

The basic layout is the same—last will and testament, advance directives, durable power of attorney and, possibly either an inter vivos or testamentary trust—but there are situations requiring special attention.

- For an increasing number of same-sex couples, providing for children requires extra care. Too often, only one parent is legally recognized and should that parent die or become incapacitated, the other parent could lose all rights to contact with the child. Include language in the will and durable power



By Joan M. Burda

of attorney to address this situation, but make clients aware that the law is changing and there is no guarantee a judge will honor the provisions. In a guardianship clause include a sentence that the surviving partner is recognized by the decedent as the child's parent and shall be given priority as the guardian. Also, provide an alternative, naming the surviving partner the guardian of the

(continued inside)

FEATURES

Who's the New Guy and What's Up?

Being Edith Bunker

Representing Same-Sex Adoption Clients

Tax Issues Affecting Same-Sex Couples

Domestic Partnership Agreements

(continued from cover)

editor/staff

SOLO is published quarterly by the General Practice, Solo and Small Firm Division of the American Bar Association, 321 N. Clark Street, Chicago, IL 60610.

SOLO is distributed free to the members of the General Practice, Solo and Small Firm Division. Any member of the ABA may join the Division by paying its annual dues of \$45.

The opinions expressed in SOLO are those of the authors and do not necessarily reflect positions or policies of the ABA or the General Practice, Solo and Small Firm Division.

Editor-in-Chief
Charles J. Driebe

Editorial Board
Sharon K. Campbell
Patricia A. Garcia
Laurie Kadair Redman
Joan M. Swartz

Special Correspondent
jennifer j. rose

Staff Editor
MaryAnn Dadisman

Designer
Andrea Siegert

Produced by
ABA Publishing

© 2006 American Bar Association.

GP | Solo
ABA General Practice, Solo & Small Firm Division

child's estate. That permits the surviving partner to continue the relationship with the child (I call this the "Auntie Mame" clause) even if he/she is not named guardian of the child.

- Include a will clause specifying that the parties opened joint bank accounts and intended them to be held jointly, with the proceeds going to the survivor. Be explicit in stating the accounts were not intended to be "accounts of convenience."

- Funeral arrangements is an area fraught with problems for same-sex couples. Many states limit the right to make these arrangements to the decedent's immediate family. Others, such as Ohio, have enacted legislation removing that restriction and allowing every person to name someone to make these decisions. For same-

sex couples, these laws permit each partner to name the other as the person authorized to carry out the arrangements.

- Using a designation of agent form allows one partner to name the other for myriad purposes such as funeral arrangements, hospital visitation, and possession of personal property. Retaining old documents, including superseded wills, also help establish a written record of the parties' intentions.

With little in the way of boilerplate language involved, there is nothing stultifying in estate planning for same-sex couples. This is an exciting area of law—one that is constantly changing—and it requires both creativity and a desire to ensure that the clients' intents and goals are met.

Joan M. Burda has a solo practice in Lakewood, Ohio, with an emphasis on estate planning for lesbians, gay men, bisexuals, and transsexuals (LGBT). She is the author of *Estate Planning for Same-Sex Couples* (ABA, 2004) and an upcoming ABA book on legal issues affecting LGBT families. She can be reached at jmburda@mac.com.



From the Editor-in-Chief

Who's the New Guy and What's Up?

By Charles J. Driebe

After many years of outstanding service, Robin Page West has passed on the mantle of editor-in-chief to Chuck Driebe—that's me. I am the senior partner of a small firm in Jonesboro, Georgia, a suburb of Atlanta. We like to say our firm solves problems in almost any area. Our areas of practice include civil and criminal trials, real estate, zoning, entertainment, and almost anything else. We know a little about most things and a lot about some. I have been active in the GPSSF Division for more years than I care to count and have served two terms on the Division Council and on numerous committees.

SOLO is a compact newsletter with each issue devoted to a single topic. It is designed to be a quick read while waiting for court or at other dead times. (We even had one lawyer mother who appreciated the fact that she could read the newsletter in one hand while feeding her son!) Issues are designed to be informative and to pique

readers' interest, but are by no means encyclopedic.

We are introducing a new wrinkle to the newsletter: There will be a four-member editorial board with each member being in charge of one of the four issues. The board represents a wide spectrum of both interests and geography. Laurie Kadair Redman of Baton Rouge is in charge of this issue dealing with same-sex relationships. The next issue will be on billing and Sharon K. Campbell of Dallas is the issue editor. The other issue editors will be Patricia A. Garcia of New Orleans and Joan Marie Swartz of St. Louis. And, of course, the omnipresent Jennifer J. Rose (she of the no caps) continues as a special correspondent for all *SOLO* newsletters. MaryAnn Dadisman is the ABA staff editor. Andrea

Siegert is the designer.

The board is interested in any suggestions for topics that can be covered in short articles of around 400 words. If you want to add to your resume, just volunteer to write an article and you may see your name in print. You can contact me or any of the issue editors.



Charles J. Driebe, editor-in-chief of *SOLO*, practices in Jonesboro, Georgia. Contact him at cjdriebe@mindspring.com.

Being Edith Bunker

By *jennifer j. rose*



Darkness fell early that winter afternoon some 25 years ago as I ended a conference with a divorce client, an ordinary, overweight, frazzled, 30-something schoolteacher, the mother of two small children. Rising from the chair to leave, she pulled on her coat, and then abruptly sat down again, stammering, “Remember how you told me to tell you the truth about everything?”

“Well, yeah.” I was in a hurry to close up the office, but her language and nervousness told me that this appointment wasn’t going to end as I’d planned.

“Valerie and I are in a relationship.”

I reached for a Marlboro, forgetting that business about not smoking in front of nonsmoking clients. Her husband’s lawyer was the meanest, toughest lawyer in the valley, the kind who took no prisoners, custody was in issue, these were prominent people in the community, and now I had

this to deal with. I tried to remain cool, but she had to know that the news came as a surprise to me. The look on my face told it all. Theory and rights were one thing, interesting intellectual exercises and debating points, but this was real. No matter how much I considered myself the very incarnation of Maude Finley, in reality, I was her cousin Edith Bunker.

We tried the case, and sexual orientation never came up. No one cared. It just wasn’t an issue. Despite preparation for every contingency, I was anxious, more nervous than my client was.

Flash forward a few years, and another divorce client came to the office, asking that I draft a will leaving everything to her best friend. The next week the client’s best friend came in, and asked that I draft a similar will, leaving everything to her best friend. Not until a year or so later, when

the two came to the office together about a joint business venture, telling me they were more than just best friends and business partners, did I put it all together. Sometimes I can be so naïve. I could have served those clients better had they not left it up to me to intuit their real relationship.

As I approach Edith Bunker’s age, I know that I am she. When I’ve used “alternative lifestyle” and “sexual preference” to address sexual orientation, thinking I’m using a polite or acceptable term, I’ve been set straight by those in the know that sexual orientation is neither an alternative nor a preference. And I still depend upon gay and lesbian friends—and particularly those I’ve met through the ABA—to clue me in.

jennifer j. rose, jjrose@jjrose.com, is the editor-in-chief of GPSolo and resides in Morelia, Michoacán, Mexico.

Representing Same-Sex Adoption Clients

By Jennifer S. Fairfax

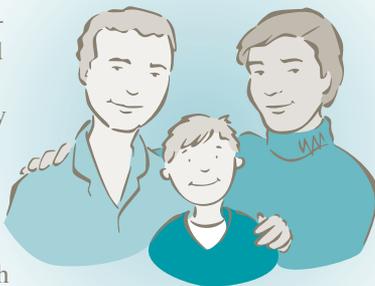
Helping gay or lesbian clients reach the goal of being joint parents through adoption is both enriching and rewarding. Here are a few practice tips:

Know the law. Be sure you're familiar with adoption laws in your state and local jurisdiction. "Second-parent adoption" generally is the term used when same-sex parents adopt a partner's child, but learn the correct terminology used in your state. Although a state may not specifically allow or preclude second-parent adoptions, some will let them proceed as joint or stepparent adoptions, and some counties are more favorable than others when it comes to granting adoptions to same-sex couples.

Identify the type of adoption. At the consult, be sure you identify the type of adoption being sought. Your client may (a) be the birth or adoptive parent who wants the partner to adopt the child; (b) want to adopt a child now so a partner can adopt the child later; or (c) want to adopt the partner's child.

Establish who you rep-

resent. Gay and lesbian clients often seek legal advice as a couple. The potential for conflict exists with second-parent adoptions because the legal



parent gives up the constitutional right to exclusively parent the child and the adopting parent takes on the legal responsibility of parenting and supporting the child even after a dissolution. Be clear in your retainer agreement about conflicts, waivers, and who is your client.

Know the legal impact on your client. Discuss what rights your client is giving up or gaining by adopting a child. Gay and lesbian clients often ask if the adoption will be recognized in other states.

While the answer should

be "yes" under the Constitution's Full Faith and Credit Clause, it's unclear whether every state will recognize two legal parents of the same sex. Advise your clients to investigate parental rights laws before relocating to another state. You should also be familiar with the tax benefits and consequences of adoption. You need not be an expert on tax law, but know the state and federal tax benefits to the adopting parent and advise your client to seek tax advice regarding dependents, filing status, and exemptions.

Network with experienced lawyers. Representing gay and lesbian adoption clients requires a lot of attention to detail, so it's helpful to reach out to others with similar legal experience in this area to help with the process.

Jennifer S. Fairfax is special counsel at Strickler, Sachitano & Hatfield, P.A., in Bethesda, Maryland, with an emphasis on adoption, LGBT, and traditional family law. Contact her at jfairfax@modernfamilylaw.com.



TAX ISSUES

Affecting Same-Sex Couples

By *Tamara E. Kolz*



Tax laws are not equally applied to opposite-sex married couples and same-sex couples. Although many same-sex couples handle their financial affairs in a perfectly appropriate manner based upon the nature of their relationship, such manner may risk unfavorable tax consequences. Planning for same-sex couples involves estate, gift, and income tax issues.

The creation of joint property may cause unintended results because of the property ownership presumptions under federal law. For example, where one partner places real estate in joint tenancy with a partner, a gift of 50 percent of the property is deemed to have been made to the partner. Placing a bank account or stock account in joint tenancy, however, does not constitute a gift since the original owner may still withdraw all of

the money at any time. A gift will occur when the co-tenant actually withdraws any of the original owner's money.

Despite the potential immediate taxable gift, the IRS considers jointly owned property to be wholly owned by and taxable in the estate of the first partner to die, unless the surviving partner can prove one-half ownership. Once the property passes to the surviving partner, the entire value of the property is included in that individual's estate. The property, therefore, is taxed twice where there is no proof of contribution to identify the actual ownership interest of each partner. A same-sex couple should consider using "payable-on-death" accounts rather than joint accounts and "transfer-on-death deeds" rather than joint tenancy.

Same-sex couples should take care when titling and retitling assets as there may be significant federal gift tax issues subject to gift tax audits. Gifts or transfers in excess of \$12,000 per year

may result in gift tax or the usage of a portion of one's \$1,000,000 gift tax exemption. If there is a significant age difference between the partners, federal generation-skipping tax may also be incurred.

In addition, the fact that same-sex couples may not file joint income tax returns also presents tax challenges. For example, if one partner owns 100 percent of real estate and the other partner pays the real estate taxes, it is unlikely that a federal income tax deduction will be available to the non-owner partner. Whenever possible, same-sex couples should align property ownership and deduction-producing activities with the desired income tax consequences.

Tamara E. Kolz is a partner at the Boston office of Holland & Knight, LLP. She specializes in estate planning, prenuptial agreements, and advising same-sex and unmarried couples. Contact her at tamara.kolz@hklaw.com.

Domestic Partnership Agreements



By Laurie
Kadair
Redman

Domestic partnership agreements describe how property is owned and how finances are managed, as well as how property will be divided if that becomes necessary. They are critical to gay and lesbian couples because the backdrop of laws that apply to traditional families does not apply to their relationships. When a couple marries, they are automatically subject to a well-established set of laws governing issues such as property ownership, financial support, and divorce. Since this “default” set of rules does not apply to same-sex couples, it is important for them to express their intentions and expectations regarding these issues in a written document.

Domestic partnership agreements are governed by general contract law principles. The agreement should be made for consideration and in the absence of fraud, duress, mistake, or misrepresentation, etc. The recitation of consideration should not include sex in exchange for assets because this may make the contract unenforceable as

immoral. The agreement should refer to the partners as such and not as “lovers.”

The agreement will vary in complexity based on your client’s situation. For example, if your client has significant wealth and is supporting a partner, you may want to expand provisions regarding separate property, support, and dissolution. At minimum, the agreement should cover:

- **Property identification.** Include separate and jointly owned real and personal property brought into the relationship. Describe the current residence.

- **Property ownership.** How will the parties treat property acquired during the relationship? Include a discussion of gifts and inheritances.

- **Income, expenses, and debt.** Are household expenses shared equally? Does each partner keep a separate bank account? How will the partners treat debt incurred prior to and during the relationship? Discuss the effect of changed financial circumstances.

- **Dissolution.** Discuss

procedures for dissolution, such as litigation, mediation, arbitration, or a collaborative law process. Describe how property is to be valued and divided. Consider pre-dissolution counseling.

- **Death.** Provide for the death of either partner during the relationship.

- **Dispute resolution.** How will disputes under the agreement be handled? The options are the same as those discussed for dissolution.

It is difficult for a couple to negotiate details regarding money, property, and break-up in the midst of a happy relationship. However, because same-sex couples can’t rely on a default set of laws to govern their relationships, it is critical for them to express their intentions and expectations in a written agreement.

Laurie Kadair Redman practices in Baton Rouge, Louisiana. Contact her at laurie@lkrllc.com or visit www.nontraditionalfamilylaw.com.

SOLO

GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

NONPROFIT ORGANIZATION
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION

West is a primary sponsor of the General Practice, Solo and Small Firm Division.



SOLOS ARE:
33% of all lawyers
46% of all lawyers in
private practice