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Legal Planning for Same-Sex Couples: Preparing for the Unexpected

Why should my partner and I consider legal planning?

Currently, no state but Massachusetts permits same sex couples to marry, and the federal government does not recognize any union between same sex partners. Therefore, many of the legal protections afforded to married couples are not available to gay men and lesbians.¹ Estate planning is important for everyone, but it is even more important for people in same-sex relationships because these relationships are generally not recognized by the legal system. In the absence of documents stating otherwise, your partner may have no rights *vis a vis* your property or in making an important medical decision on your behalf. When no documents are in place, the courts by default turn to your biological family when you die or become incapacitated, no matter how long you and your partner have been together. Unless you want your biological family to make decisions about

your health care and your property, you need to do some planning now.

Legal planning is also helpful in preventing disputes should you and your partner have disagreements. Couples who have discussed issues such as the division of property - before such issues become problems - are in a better position to resolve conflicts amicably. When you engage in a process to clarify your intentions and wishes while you are getting along, you are less likely to have disputes should you break up, and are more likely to avoid a costly and painful legal battle.

No one likes thinking about becoming ill, dying or breaking up. As difficult as this process is, this kind of planning can save tremendous heartache in the long run. Investing time and money now will ultimately save you time and money in the long run and help insure that your and your partner's wishes are respected. Plan for the unexpected now so that in a crisis you and your partner are protected.

How do we get started?

Ultimately, you and your partner will need an attorney to help draft a variety of estate planning documents. GLAD can provide you with referrals to attorneys who are sympathetic to and knowledgeable about the legal issues gay and lesbian couples face. However, before you consult an attorney,

¹ In Vermont, same-sex couples can obtain a parallel status to marriage known as a civil union, which provides all of the legal protections available to married couples under Vermont state law. Same sex couples may marry in Massachusetts, but these marriages are not recognized by the federal government. At this point in time, it is unclear how other states will treat civil unions or Massachusetts marriages. As a result, the legal planning documents suggested below remain important for all.

you and your partner may want to review the sample documents enclosed with this packet and discuss how you would apply these documents to your situation. The idea is to create an agreement that addresses your needs, concerns and understandings. If you and your partner are clear about what you want before you speak with an attorney, you will save time and money.

What documents do we need?

There are a variety of documents you may want to consider. The enclosed materials explain what each document is and what it does. Which documents you choose to prepare will depend on what you and your partner are hoping to achieve. At the very least, consider completing a will, durable power of attorney and a health care proxy. In addition, you may want to develop a cohabitation agreement that outlines your assets, your obligations, distribution of your assets and obligations should you separate, and how disputes will be resolved.

Will the courts consider these documents valid?

Gay men and lesbians have the same rights as anyone else to execute a will, health care proxy, durable power of attorney, etc. While these documents can be contested, in general, the court will try to honor your wishes as expressed in these documents. In the case of a will, for example, whoever challenges it would have to show that you were incompetent when you signed the will or that you signed under undue influence or fraud.

Many of the written cohabitation or partnership agreements between same sex partners have not been tested in court. See the enclosed summary of property division and contract rights cases. It is difficult to say whether or not a particular court would honor such agreements. However, in the absence of written documents, your standing before the court is even more precarious.

Also remember that the idea behind such agreements is to avoid the need to go to court altogether.

How much will this cost?

The cost of preparing these legal documents is difficult to gauge and will vary depending on your specific situation, what you and your partner need, and which attorney you hire. Many of these documents, such as wills, are relatively simple to draft and may not be too costly. Again, if you and your partner work out the details ahead of time, you may be able to reduce the number of hours you have to pay your attorney. For some of this work, such as cohabitation agreements, you and your partner will want to consult separate attorneys to insure that both of your interests are represented fairly. Some attorneys charge a flat rate for doing this kind of work, while others charge by the hour.

GLAD's Lawyer Referral Service can help you find an attorney in your area of New England. However, we cannot provide you with information about their rates. Hiring an attorney is like purchasing any service. You may want to shop and compare. Look for someone who has experience in this area and with whom you and your partner feel comfortable.

What if we have children? How can we protect our whole family?

If you and your partner have children, you will want to take additional steps to protect your family. Depending on where you live, you and your partner may be able to jointly adopt your children or prepare guardianship papers that will help insure your children remain with your partner in the event of death. Your will and partnership agreements will also need to reflect your wishes *vis a vis* your children. GLAD has prepared a separate publication for couples with children. If you have not already received it, please call and request a copy

Glossary of Legal Protections

The following list of documents can help you define your legal relationship with your partner. In executing such documents, it is important to consult with a private attorney.

Health Care Proxy (Sometimes called a Medical Power of Attorney):

Allows you to designate the person you would want to make medical decisions if you become mentally or physically incapacitated, and allows you to detail types of treatment you would or would not want to receive. Also grants hospital visitation rights and access to medical information for the person designated as the health care proxy. Anyone over 18 years of age can be designated a health care proxy.

Note: Health Care Proxies are not legally recognized in all states; in states that do not recognize Health Care Proxies, Durable Powers of Attorney may serve the same function.

Durable Power of Attorney:

Allows you to designate someone to manage your personal finances and/or your business affairs. May also allow you to designate a person to make medical decisions on your behalf.

Note: A Power of Attorney is only valid when you are competent; however, a Durable Power of Attorney becomes effective upon disability and remains effective. Therefore, a Durable Power of Attorney provides the most protection and should be used whenever possible.

Joint Tenancy Agreement (Sometimes called a Co-Tenancy Agreement):

Two people may hold real estate, bank accounts, cars, or other property as “joint tenants.” Upon death, property passes directly to the survivor without going through probate court.

Will:

Directs the distribution of property to individuals and organizations you choose; names an executor to carry out your instructions.

Note: If you have children, be sure to consult an attorney about how you can nominate a guardian for them.

Burial Instructions (Sometimes called a Declaration As To Remains):

Can be included in a will. However, because burial is often completed before a will is located, a separate letter of instruction is recommended.

Living Together Agreement (Sometimes called a Cohabitation Agreement):

Similar in some ways to pre-nuptial agreements, often these documents help couples clarify their intentions and expectations regarding financial issues while they are getting along, and contain instructions on what will happen to joint property and co-mingled finances if the couple breaks up.