

Planning for Same Sex Couples in Ohio

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I. Introduction.

Since the high court of Ontario legalized same-sex marriages¹, to be followed soon after by the high court of British Columbia, American gay and lesbian couples who want the commitment and legal benefits of marriage have contemplated being married in Canada. The *New York Times* reports that between the Ontario court's ruling on June 10, 2003, and August 25, 2003, 590 gay and lesbian couples took out marriage licenses at Toronto's city hall, more than 100 of which were Americans who crossed the border to "marry."² The same article reported that gay Canadians are ambivalent toward their newfound ability to marry.³

Previously, Vermont granted "civil union" status to same-sex couples, giving them some equivalent rights to married persons, following a Vermont Supreme Court case determining that it is required under the Vermont constitution.⁴ A 1993 decision by the Supreme Court of Hawaii⁵ prompted Congress to pass the Defense of Marriage Act in 1996 to permit states to refuse to

¹ Same-sex marriages are already permitted in Belgium and The Netherlands.

² Kraus, "Free to Marry, Canada's Gays Say, 'Do I?'" , *The New York Times*, August 31, 2003. Many thanks to ACTEC fellow Ruth Rounding, of Drew & Ward in Cincinnati, Ohio, for providing me with this and other articles from the popular press about same-sex marriage in Canada.

³ Kraus reports:

It is a debate that pits those who celebrate a separate and flamboyant way of life as part of a counterculture against those who long for acceptance into the mainstream. So heated is the conversation that some gay Canadians said in interviews that they would not bring up the topic at dinner parties.

"Ambiguity is a good word for the feeling among gays about marriage," said Mitchel Raphael, editor in chief of *Fab*, a popular gay magazine in Toronto. "I'd be for marriage if I thought gay people would challenge and change the institution and not buy into the traditional meaning of 'till death do us part' and monogamy forever. We should be Oscar Wildes and not like everyone else watching the play."

Id.

⁴ *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).

⁵ *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), reconsideration granted in part, 74 Haw. 650, 875 P.2d 225 (1993).

recognize same-sex marriages performed in other states, and to define the requirements for spousal benefits under federal law. A case currently pending in the Massachusetts Supreme Court⁶ was filed by same-sex partners whose application for a marriage license was denied.

Against that backdrop, estate planning counsel advise gay and lesbian clients. Gay and lesbian clients who are involved in committed same-sex unions may want to provide for their partners as would a spouse in a marriage. Some of the issues that arise in counseling same-sex couples in Ohio are addressed in this paper.

II. Inheritance in Ohio.

A surviving same-sex partner does not figure into the statutory framework of descent and distribution in Ohio.⁷ It is, therefore, imperative that same-sex partners who want to provide for the survivor of them do so by will, trust, payable on death designation, or transfer on death designation.⁸

III. Transfer Tax Issues.

A. Federal

1. Estate Tax.

When a decedent leaves behind a surviving spouse, the decedent's estate is permitted to defer the federal estate tax at the first death by use of the marital deduction.⁹ The surviving partner in a same-sex union does not enjoy the benefit of the marital deduction. For estates of gay and lesbian partners that exceed the applicable exclusion amount, estate liquidity will be an issue to be addressed, perhaps with life insurance.

⁶ *Goodridge v. Dept. of Health*, No. SJC-08860. Oral argument was held March 4, 2003.

⁷ Ohio Rev. Code § 2105.06.

⁸ Joint tenancy is another tool in the toolbox, but the complications of joint tenancy discussed at sections III.A.1. and III.A.2 may cause same-sex couples to avoid it.

⁹ IRC § 2056.

With regard to jointly held property, the estate of the first partner to die will generally be presumed to include the entire value of the jointly held asset that passes to the surviving partner, except to the extent that the asset originally belonged to the surviving partner.¹⁰ By contrast, when a married person dies, only 50% of the jointly held asset is presumed to be included in the estate of the deceased spouse.¹¹

In at least one fact-specific case involving same-sex partners, the Seventh Circuit, affirming the Tax Court, rejected the surviving partner's claim of a resulting trust over 50% of the couple's home, and held that the entire interest in the home should be included in the decedent's gross estate.¹² The decedent had purchased the home, her name alone appeared on the deed, and the court found that the decedent was not a nominee for the couple's joint ownership. Despite some evidence that the surviving partner paid some household expenses, performed housekeeping services, and handled the couple's finances, the court was unable to find that the surviving partner furnished consideration for the property at purchase.

Moreover, the surviving partner in a same-sex union with a farmer will not be a "qualified heir" or a "surviving spouse" for purposes of the special use valuation.¹³ If the deceased partner operated the farm at his or her death, the surviving partner will not be given the benefit of the deceased partner's material participation in the farm's operation.¹⁴ Similarly, for decedents who die before January 1, 2004, the same-sex relationship will be insufficient to support a surviving partner's claim to be a "member of the family" and therefore a "qualified heir" for purposes of claiming a Qualified Family Owned Business Interest exclusion.¹⁵

¹⁰ IRC § 2040(a).

¹¹ *Id.*

¹² *Scott v. Commissioner*, 226 F.3d 871 (7th Cir. 2000).

¹³ IRC § 2032A.

¹⁴ See IRC § 2032A(b)(5).

¹⁵ IRC § 2057(i)(1) and (2).

2. Gift Tax.

Long-term same-sex partners often make gifts to one another without thinking of the gift tax ramifications of the gift. When the gift is direct gift of stock or cash, the donor partner may realize the gift tax ramifications of the gift. However, the gift tax implications may be less clear to a person who owns an asset and wants to create a joint tenancy with the right of survivorship with his or her same-sex partner, whether to avoid probate at death or to reflect the donor's sense of intimacy and commitment to the donee partner.

Example: Partner A purchases a home for \$800,000, and provides all the consideration for the purchase without incurring debt. He requests a deed creating joint tenancy with the right of survivorship with Partner B, with whom he has had a committed relationship for several years. Partner A has made a gift of \$400,000 to Partner B.

If the same gift were made by heterosexual married persons, the marital deduction¹⁶ would eliminate both a gift tax and the use of a portion of the donor's applicable exclusion amount. The amount by which the gift exceeds a same-sex partner's annual exclusion amount of \$11,000 will either eliminate part of the donor's applicable exclusion amount or create a gift tax.

When counseling a gay or lesbian client, it is wise to ask the client who has a same-sex partner about the client's prior giving history to determine whether gifts have been made, whether gift tax returns have been filed, and whether a late gift tax return should be filed.

As estate planning counsel are aware, while the estate tax is headed toward its one-year repeal, the gift tax will remain in effect. Gift tax issues will continue, therefore, to arise for same-sex couples.

Finally, while spouses are permitted to do "gift-splitting" gifts, the option is unavailable to same-sex partners. Thus, if one partner makes a \$22,000 gift from his assets, the other partner's annual exclusion cannot be applied to remove the entire gift from the gift tax.

A parenthetical note about gifts: When spouses make gifts to one another, the gift does not necessarily remove the gifted property from the reach of the donor spouse. In the event of divorce or dissolution, the gifted property may

¹⁶ IRC § 2523.

continue to have the character of marital property subject to division. Because the established rules for the division of property in the event of divorce and dissolution do not apply to the termination of same-sex unions, absent other circumstances, property transferred by gift may not be recovered by the donor partner.

B. Generation Skipping Transfer Tax.

If lifetime gifts, or bequests and devises, are made between same-sex partners of similar age, the GST tax is not an issue. However, in the event of a “May-December” same-sex union involving a partner who is more than 37 ½ years younger than the other, the GST tax may be an issue to be taken into account.

In the case of transfers from an older spouse to a younger, the spouses are assigned to the same generation.¹⁷ Thus, the donee spouse is not a skip person, even if he or she is more than 37 ½ years younger than the donor spouse.

The same rule does not obtain when one same-sex partner makes a gift to his or her much younger partner. The donee will be considered a skip person.

C. Ohio.

Just as the marital deduction does not apply to devises and bequests to a same-sex partner, the Ohio marital deduction is reserved for married persons.¹⁸

In the case of joint tenancies, half the jointly held property is included in the estate of the first spouse to die.¹⁹ By contrast, unless a surviving same-sex partner proves he or she owned a portion of the jointly held property and did not acquire it from the decedent for less than adequate consideration, the entire joint asset will be includible in the deceased partner’s gross estate.²⁰

Also, a deduction for qualified family-owned business interests will not be available to a surviving partner simply by virtue of his or her relationship to the

¹⁷ IRC § 2651(c)(1).

¹⁸ Ohio Rev. Code § 5731.15.

¹⁹ Ohio Rev. Code § 5731.10(B).

²⁰ Ohio Rev. Code § 5731.10(A).

decedent.²¹ Similarly, a surviving partner will not be considered a qualified heir for purposes of receiving the special use valuation for qualified farm property.²²

IV. Income Tax Issues.

A. Retirement Accounts.

1. One income tax benefit of marriage is the ability to defer income taxes on retirement accounts at the death of the first spouse.

2. An account owner's surviving spouse is permitted to treat her spouse's Qualified Retirement Plan account or Individual Retirement Account as her own, and to roll the account over to her own account.²³ Spousal rollover is unavailable for same-sex partners.

3. The minimum required distribution rules regarding spouses do not apply to same-sex partners.

4. The Retirement Equity Act of 1984 (REA)²⁴ does not apply to same-sex unions.

B. The "Marriage Penalty."

1. The "marriage penalty" refers to the reality that two-income married couples who earn similar income pay a greater income tax than they would if they were unmarried.

2. Same-sex partners may benefit from the "marriage penalty." The Gay Financial Network gives the following example:

Today, a married couple with taxable income of \$200,000 would owe 2002 taxes of about \$51,813. Two single filers – our code word for gay couples – with taxable incomes of \$100,000 each

²¹ Ohio Rev. Code § 5731.20.

²² Ohio Rev. Code § 5731.011(A)(2) and (A)(4).

²³ IRC §§ 402©(9) and 408(d).

²⁴ P.L. 98-397. Provisions are found in IRC §§ 401(a)(11) and 417, and ERISA § 205.

would owe taxes of \$48,630. In other words, same-sex couples benefit from the marriage penalty to the tune of about \$3,183.²⁵

3. The Gay Financial Network proposes that the income earning partner in a same-sex union claim his or her supported partner as a dependent if (a) the supported partner is a citizen of the United States, (b) the supporting partner provides more than 50% of the supported partner's total support for the year, (c) the supported partner's total annual income is less than \$2750, (d) the supported partner is unmarried, and (e) the relationship does not violate local law.²⁶

V. Planning Issues and Ideas.

A. Revocable Living Trust.

1. More gay and lesbian couples are "out" now than twenty years ago, but still some prefer that the nature of their relationship be kept private. A will admitted to probate may inform people in the decedent's community of the nature of the relationship. Moreover, in cases in which the partners' families are uncomfortable with the partners' arrangement, some partners want to provide the privacy for the benefit of their families. A revocable living trust can provide a layer of privacy some same-sex couples find comforting.

2. A revocable living trust can also provide lifetime privacy. A partner with concerns about his or her employer's knowing about his or her same-sex union may be concerned about naming his or her partner as the beneficiary of an employment-related life insurance policy. He or she may, therefore, want to direct that the proceeds of employment-related life insurance be paid at death to the trustee of his or her revocable living trust. Similarly, rather than asking his or her attorney to prepare a transfer on death deed giving property to his or her partner, a partner in a same-sex union may want to convey his or her real property to himself or herself as

²⁵ "That Marriage Penalty That Benefits Gay Couples," April 10, 2003. The article is found online at <http://www.gfn.com/finance/story.phtml?sid=13420>.

²⁶ "Can You Deduct Your Partner On Your Tax Return?," February 11, 2003. The article is found online at <http://www.gfn.com/finance/story.phtml?sid=13420>. Before the Supreme Court issued its decision in *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472 (2003), advisors were concerned that state sodomy laws could be used to establish illegality in a same-sex relationship.

trustee of his or her trust, granting use of the real property to the surviving partner in the terms of the trust agreement.

B. Will.

1. Ohio's statute of descent and distribution does not provide an intestate share for same-sex partners.²⁷ At a minimum, therefore, same-sex partners who want to provide at death for the surviving partner should have a will.

2. Divorce, dissolution, annulment, and legal separation automatically revoke a devise or bequest to a former or separated spouse, and revoke appointment of the former or separated spouse as executor, unless a contrary purpose is stated in the will.²⁸ No such rule applies to the separation of same-sex partners. When drafting a will for a partner in a same-sex union, thought should be given to explicit language revoking a devise or bequest to the other partner, and revoking appointment of the other partner as executor, in the event they have parted company before the testator-partner's death.

3. A partner who has one or more minor children, and who wants the surviving partner to be the guardian or the person or estate of the child or children, should express that desire by nominating the surviving partner in a will or durable power of attorney.²⁹

C. GRIT.

1. Because the Chapter 14³⁰ rules only apply to transfers to family members, and a same-sex partner is not deemed to be a family member, a Grantor Retained Income Trust (GRIT) is a tool that is available to same-sex couples but not married couples.

2. GRATs and GRUTs are available for gifts to family members, but the grantor is limited to an annuity or unitrust amount. A GRAT or GRUT avoids the Chapter 14 rules in family transfers.

²⁷ See Ohio Rev. Code § 2105.06.

²⁸ Ohio Rev. Code § 2107.33.

²⁹ Ohio Rev. Code §§ 2111.12, 2111.121, 1337.09(D).

³⁰ IRC §§2701-2704.

3. By contrast, the grantor of a GRIT is permitted to retain an interest in the accounting income from the trust for a fixed term of years, not merely an annuity or unitrust amount. At the conclusion of the GRIT term, the assets remaining in the GRIT are distributed to the beneficiary. If the grantor dies during the GRIT term, the assets in the GRIT are included in the grantor's gross estate.³¹

4. By using a GRIT, a grantor who is a partner in a same-sex union can leverage his or her gift to his or her partner. At the time the GRIT is created, the grantor makes a gift to the beneficiary. The value of the gift is determined using the current 7520 rate. If the accounting income is lower than the 7520 rate assumed for calculating the value of the retained income interest, a significant discount in the value of the gift may be obtained because the income interest is overvalued.

D. Cohabitation Agreement.³²

1. Because divorce and dissolution, and the established statutory rules that pertain to them, are unavailable to partners to same-sex unions, same-sex couples who are committing to a long-term union should execute a cohabitation agreement.³³

2. Cohabitation agreements typically address the ownership of property; financial matters, such as income and support, payment of household expenses, and payment of debts; tax issues; division of domestic duties; provision of health insurance; if children are involved, custody, visitation, and provision of support in the event of termination of the relationship; the possibility of support akin to spousal support in the event of termination of the relationship; and mediation or arbitration of disputes.

E. Insurance Planning.

³¹ IRC § 2036(a).

³² The Gay Financial Network, www.gfn.com, advocates a family LLC.

³³ Cohabitation agreements are sometimes referred to as “domestic partner agreements,” “domestic partner marriage agreements,” “living together contracts,” and “pre-commitment agreements.”

1. Because the marital deduction is unavailable to defer the estate tax on the death of the first same-sex partner to die, life insurance may be needed to provide liquidity to pay the estate tax on the first death.

2. As estate planning attorneys know, the gross estate of an insured will include the proceeds of a life insurance policy if the insured, at the moment before death, retained incidents of ownership in the policy on his own life, no matter to whom the proceeds are paid.³⁴

3. Two common techniques for avoiding inclusion of the policy in the gross estate are placing ownership of the policy with a beneficiary or placing ownership with the trustee of an irrevocable life insurance trust (ILIT).

4. All the usual disadvantages of placing ownership with a beneficiary apply when the beneficiary is the insured's same-sex partner. In addition, however, if the partners terminate their relationship, complications arise without the benefit of a domestic relations court's intervention.

5. If an ILIT is used, thought should be given to the way in which the beneficiary is defined. It may be advisable to describe the beneficiary as the insured's "partner" at the time of the insured's death, rather than naming the insured's current partner. The ILIT agreement should also identify contingent beneficiaries.

F. Power of Attorney.

1. A gay or lesbian client may wish to designate his or her same-sex partner as an agent in a power of attorney.

2. A same-sex partner may, in his or her durable power of attorney, nominate the other partner to serve as guardian of his or her estate and person if he or she becomes incompetent.³⁵

G. Living Will and Power of Attorney for Health Care.³⁶

³⁴ IRC § 2042(2).

³⁵ Ohio Rev. Code §§ 1337.09(D), 2111.02, 2111.121.

³⁶ Ohio Rev. Code §§1337.11-1337.17; Ohio Rev. Code chapter 2133. Note also that Am. H.B. 72, passed in the 125 General Assembly, becomes effective October 29, 2003, and permits the creation of a "declaration for mental health treatment" under new Ohio Rev. Code chapter 2135.

1. If a same-sex partner executes a living will declaration, but does not designate his or her partner as a person to be notified by his or her physician that he or she is terminally ill or in a permanently unconscious state, the same-sex partner may not be notified. The persons statutorily to be notified are all members of the declarant's family.³⁷ Those persons are the ones who would have the authority to object to the withdrawal of life sustaining treatment.³⁸

2. If a same-sex partner has not executed a living will declaration, his or her physician will consult with members of the patient's family in the order prescribed by statute.³⁹ Again, the problem can be eliminated by executing a living will declaration and power of attorney for health care.

H. Beware of Differing Perspectives.

In the typical scenario involving a married couple, the husband and wife share the same goals. Typically, they want to provide adequately for the surviving spouse, and provide for the couple's children at the death of the surviving spouse. Even in the case of a second marriage, often the objectives are shared.

In the instance of a same-sex union in which neither partner has children, the couple may want to provide for the second partner, but thereafter, the partners' goals may diverge.

VI. Selected Non-Tax Issues During Lifetime.

A. Names.

The Ohio Supreme Court has ruled that cohabiting same-sex partners may change their surnames to a new name of their own creation.⁴⁰

³⁷ In order, the persons to be notified are a declarant's guardian, if any; spouse; adult children; parents; or adult siblings. Ohio Rev. Code § 2133.05(A)(1)(1)(ii).

³⁸ Ohio Rev. Code § 2133.05(B).

³⁹ Ohio Rev. Code § 2133.08(B) prescribes those persons as the patient's guardian, if any; spouse; adult children; parents; adult siblings; or the nearest adult related by blood or adoption.

⁴⁰ *In re Bicknel*, 96 Ohio St.3d 76, 771 N.E.2d 846 (2002). The partners created a surname from their respective surnames.

B. Parental Rights.

The Ohio Supreme Court also determined that a Juvenile Court has jurisdiction to determine parental rights and responsibilities when a petition is filed by a parent seeking to grant parental rights to her same-sex partner.⁴¹ The mother of the children at issue wanted her same-sex partner to have access to the children's medical and school records, to have custodial rights in the event of her death, to have rights in the event the same-sex union terminated, and to recognize the partner's role as a "parent" to the children. While the Court did not adopt "second parent adoption," it did recognize jurisdiction in the Juvenile Court to entertain the petition for such allocation of parental rights and responsibilities between same-sex partners based upon the best interest of the children.

C. Adoption.

Sexual orientation is not a *per se* barrier to adoption in Ohio.⁴²

D. Family and Medical Leave Act.

The Family and Medical Leave Act⁴³ (FMLA) grants up to 12 weeks of leave to employees in a 12-month period to care for a spouse, son, daughter, or parent who has a serious medical condition.⁴⁴ Because "spouse" is defined as a husband or wife,⁴⁵ FMLA does not apply to care given to sick same-sex partners.

E. COBRA.

⁴¹ *In re Bonfield*, 97 Ohio St.3d 387, 780 N.E.2d 241 (2002).

⁴² *In re Adoption of Charles B.*, 50 Ohio St.3d 88, 552 N.E. 2d 884 (1990). *But see, In re Adoption of Doe*, 130 Ohio App.3d 288, 719 N.E.2d 1071 (1998), discretionary app. denied, 85 Ohio St.3d 1467, 709 N.E.2d 173, reconsideration denied, 86 Ohio St.3d 1408, 711 N.E.2d 234 (1999) (Adoption is a statutory creation, to be strictly construed. The lesbian partner of a child's mother could not adopt without terminating the mother's parental rights. The court wrote that the lesbian partner's sexual orientation was not an issue).

⁴³ 29 U.S.C. § 2601 *et seq.*

⁴⁴ 29 U.S.C. § 2612(a)(1)(C).

⁴⁵ 29 U.S.C. § 2611(13).

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)⁴⁶ permits a married employee who loses his or her job to purchase health coverage for his or her family, and provides the same option for the employee's family in some circumstances. COBRA does not require coverage for a gay or lesbian's same-sex partner, though some employers voluntarily grant such coverage.⁴⁷

VII. Selected Non-Tax Issues At Death.

A. Disposition of the body.

1. In the ideal case, the family of a deceased gay or lesbian person, and the decedent's surviving partner, agree about whether the decedent's body should be buried or cremated, where the remains will be interred, and where the funeral will be held.

2. In some cases, though, the family and surviving partner may not be in agreement. Indeed, it is possible open hostility will surface.

3. If a person dies as a result of criminal activity or violence, by casual, by suicide, or in a suspicious or unusual manner, or appears to be in good health and dies suddenly, the next of kin, other relatives, and friends of the deceased person, in that order, have the right to dispose of the deceased person's remains.⁴⁸ While I have not been able to find an Ohio case that deals specifically with this issue, it appears that the right of the deceased partner's family to dispose of his body takes precedence over the preferences of the surviving partner.

4. The intention of the deceased partner, if established, should govern the disposition of his body. However, his body is not property to be disposed of by will.⁴⁹

⁴⁶ 29 U.S.C. §§ 1161-1168.

⁴⁷ A "qualified beneficiary" who may elect COBRA coverage, depending upon the "qualifying event" that triggers COBRA coverage, may be the employee, the employee's spouse, the employee's surviving spouse, or the employee's dependent child. 29 U.S.C. § 1167.

⁴⁸ Ohio Rev. Code § 313.14, which deals with the role of the coroner, does not seem to qualify the priority to only those cases in which the coroner actually becomes involved. The order of priority appears to apply no matter whether the coroner becomes involved.

⁴⁹ *Hayhurst v. Hayhurst*, 4 Ohio Law Abs. 375 (C.P. Ct. 1926).

5. The wishes of the decedent are a factor a court will consider.⁵⁰ Same-sex partners should unequivocally write their intentions so the surviving partner has some argument to present to the deceased partner's family, and if necessary a court.

VIII. Conclusion.

Some gay and lesbian couples regard the current legal playing field as unfair. As they advocate for a right to marry, or to receive equivalent benefits to those available to married couples, they look to estate planning professionals to guide them through the process of planning during lifetime and for death.

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⁵⁰ See, e.g., *Smiley v. Bartlett*, 6 Ohio N.P. 435 (C.P. Ct. 1889).