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## **Estate Planning for Unmarried Couples**

Estate planning is appropriate for individuals whether they are married, single, or unmarried couples in long term relationships. Unmarried couples, whether heterosexual or same sex, can accommodate their needs with a few special considerations. In an area such as this where the law is rapidly changing, it is helpful to review the current state of affairs.

### Unmarried Partners – Present State of Affairs

When an area of law is in a state of flux, lawyers use a special term: unsettled. There is no better way to describe current law with respect to unmarried couples.

Depending on where a same sex couple lives, they can form a legal relationship in which their status is recognized as married, domestic partners, a civil union or as reciprocal beneficiaries. Currently sixteen states and the District of Columbia follow variations along this spectrum, with the State of New York just recently enacting legislation to permit gay marriages.

Here in California things are equally unsettled. Two types of relationships co-exist. There are approximately 18,000 gay couples who were legally married during the period from June 2008 to November 2008, until Proposition 8 took effect. Book ending this, domestic partnerships for same sex couples have been in place since 2005, with 58,000 registered domestic partners as of 2010. The future of Proposition 8 will be decided later this year by the California Supreme Court.

What are the legal ramifications for same sex couples? Depending on state law, same sex couples have the same family law rights as married couples. The rights to annulment, divorce, child custody, child support, alimony, domestic violence protection, adoption and property division. Same sex couples have the right to sue under tort law for wrongful death and loss of consortium. They have medical rights including hospital visitation rights, access to medical records and the ability to create Durable Powers of Attorney naming a spouse or partner as a health agent. Same sex couples have the right to take family leave, to file state taxes jointly and to inherit property through intestate succession.

In contrast, Federal law recognizes no comparable protections for same sex couples. No joint tax filings, no social security benefits, no veteran or military benefits, no estate and gift tax exemptions, and no immigration rights are among some of the major differences. In addition, under the Defense of Marriage Act (DOMA), no state is required to recognize a same sex marriage which is valid in another state. Although the Obama administration no longer defends this law due to constitutionality issues, state laws vary from no enforcement whatsoever to states that have enacted "super" DOMA laws.

Given this scenario, how do same sex couples as well as unmarried heterosexual couples protect themselves and their spouse or partner? The answer for both is a bullet proof estate plan.

### A Bullet Proof Estate Plan

For either type of couple, it becomes critical to create an estate plan. For gay couples especially, with so much uncertainty surrounding their legal status it is completely possible that public and private entities in other states will not respect domestic partnership status. This is almost a certainty in states where the law is extremely hostile to gay couples.

Therefore, it is extremely important that domestic partners have trust and/or wills, powers of attorney for finance, advance health care directives, and a written agreement as to division of assets in case of separation.

Why an estate plan? Wills are inadequate because they require probate. Probate involves a high cost and easily can stretch beyond a year in duration. Even worse, probate is a public process and an emotional burden for survivors. Finally, wills can be contested by family members especially if they never came to terms with the life choices of the deceased.

Why not acquire property under joint tenancy? Because joint tenancy offers inadequate protection. The survivor's property may still be subject to probate on the second death if no trust was put in place, and consequently may result in a loss of control on the survivor's death. Joint tenancy also entails a permanent change in ownership whereby taxes may apply. Finally, a joint tenant may be subject to bankruptcy or judgment claims of the other joint tenant's creditors. This could result in an involuntary conversion of an asset.

### The Components of a Bullet Proof Estate Plan

A bullet proof estate plan is composed of the same elements as a traditional trust with one special provision – reciprocity. Reciprocity is a contractual agreement between each spouse or domestic partner that neither of them is free to change their trust without the consent of the other. This provision is written into the trust. It also includes a notification requirement so that the other party must be notified if a change will take place.

A bullet proof estate plan contains three components:

1. A revocable trust for each domestic partner.

Both domestic partners create reciprocal estate plans to care for each other and then distribute to predetermined beneficiaries. This enables a smooth and efficient transfer process. It features the ability to keep assets in trust for the care and benefit of the surviving partner during the survivor's lifetime. Then, the trust controls ultimate distribution to the named beneficiaries.

2. Durable Powers of Attorney for finances and health.

These are especially crucial. The financial power of attorney avoids the need for court action in the event of incapacity. It can enable the agent full powers to control finances or may be limited to only specific powers. The health power of attorney conveys the same powers over medical decisions and access to records as would be afforded a spouse. It is particularly important to have one when traveling out of state because hospitals recognize and understand these documents. In California it is especially important to have a health power of attorney if the couple is not a registered domestic partnership.

3. A pour-over will.

This type of will has the same purpose and effect as in any estate plan. It serves as a safety net in case an asset has been inadvertently been omitted or to name guardians.

### Conclusion

With careful planning any couple can care for themselves and their loved ones through traditional estate planning techniques. Let an attorney at Acuña, Regli and Klein guide you through this process.