

OVERVIEW OF GAY AND LESBIAN LEGAL ISSUES IN TEXAS

Mitchell Katine
Katine & Nechman L.L.P.
1111 North Loop West, Suite 180
Houston, Texas 77008
Telephone: (713) 808-1001

mkatine@lawkn.com
www.lawkn.com

Houston Bar Association
November 9, 2007

INDEX

I.	Introduction	1
II.	Glossary of Common Terms	2
III.	History of Gay Rights Movement	4
IV.	The United States Constitution	5
	1. <u>Full Faith and Credit Clause; September 17, 1787</u>	5
	2. <u>Amendment XIV. (1868)</u>	5
V.	The Texas Constitution	5
	1. <u>Article 1, Section 3a – Equality Under the Law</u>	5
	2. <u>Article 1, Section 32 – Marriage</u>	5
VI.	Significant GLBT Cases	5
VII.	Marriage Equality (Same-Sex Marriage)	9
	1. <u>Federal Defense of Marriage Act (“DOMA”)</u>	9
	2. <u>Texas Defense of Marriage Act (“DOMA”)</u>	9
	3. <u>Texas Family Code § 6.204</u>	9
	4. <u>United States General Accounting Office Report by the Office of the General Counsel dated January 31, 1997</u>	10
	5. <u>Marriage Equality Litigation</u>	10
	6. <u>The U.S. Constitution’s Full Faith and Credit Clause</u>	12
VIII.	Relationship Dissolution	14
	1. <u>Statute of Fraud Implications</u>	15
	2. <u>Joint Ownership Agreements</u>	15
	3. <u>Partnership and Joint Ventures</u>	16
	4. <u>Imposition of Trust and Confidential Relationship</u>	17
	A. Express Trust	18
	B. Resulting Trust	18

	C.	Constructive Trust	19
	5.	<u>Partition of Jointly Owned Property</u>	21
	6.	<u>Bank Accounts</u>	22
	7.	<u>Gift</u>	22
IX.		Family Creation	24
	1.	<u>Adoption</u>	24
	2.	<u>Surrogacy</u>	29
X.		Employment	31
	1.	<u>Sexual Orientation Is Not a Recognized Protected Group</u>	31
	2.	<u>Employment Non-Discrimination Act of 2007</u>	32
	3.	<u>Same-Sex Sexual Harassment</u>	33
	4.	<u>Sex Discrimination Based on Male and Female Stereotypes</u>	33
XI.		Real Estate	35
	1.	<u>Landlord-Tenant Relationship</u>	35
	2.	<u>Purchasing Real Property Together</u>	36
		Sample General Warranty Deed	37
	3.	<u>Adding a Partner On As a Co-Owner, After One Partner Purchased Real Property</u>	40
		Sample Survivorship Agreement	40
XII.		Estate Planning	41
	1.	<u>Estate Planning Documents</u>	42
	2.	<u>Contestability of Estate Documents</u>	43
	3.	<u>Alternatives to Estate Documents (or in addition to them)</u>	44
	4.	<u>Problems With Testamentary Transfer of Real Estate</u>	44
XIII.		A Look Ahead	45
I.		INTRODUCTION	

By many accounts, the gay and lesbian population of Houston, Harris County, Texas is increasing. With the increase of gay and lesbian individuals comes the need for the Houston legal community to be prepared to handle the many diverse and sometimes unusual legal issues presented by their gay and lesbian clients. In comparing the results of the 1990 census with the 2000 census, the increase in the gay and lesbian population in both the United States, Texas and Harris County is remarkable. According to the results of the 1990 census, there existed 145,000 same sex unmarried households in the United States. In 2000, the census revealed that there were 595,000 same sex unmarried households in the United States.

There are many reasons why there may be a significant increase in the reported same sex households in the United States. One of those reasons is that gay and lesbian individuals feel more comfortable in self identifying themselves. A conservative estimate of the gay and lesbian population is that gay and lesbian people make up 5% of the overall population of persons 18 and older in the United States. If there are 209,128,094 people in the United States, that would mean that there are at least 10,456,405 gay and lesbian people in the United States. It is reported that 30% of gay and lesbian people live in a committed relationship in the same residence, that number being 3,136,921.

With regards to the gay and lesbian population in Texas, the 2000 census puts the gay population in the United States at 5,872,654 with 436,866 living in Texas. Also, based on the 2000 census, Harris County has 20.1% of the state same sex households.

Regardless of how one wants to estimate or measure the gay and lesbian population in the United States, Texas or Harris County, there is no doubt that a significant number of persons living in Houston, Harris County are gay, lesbian, bi-sexual, or transgender.

This paper and presentation has been designed to present an overview of the various legal issues presented when your client is gay, lesbian, bi-sexual, and transgender. Due to the special needs of transgender individuals, the unique legal issues involved with same, and the limited time and space of this CLE program, this paper and presentation will primarily focus on gay and lesbian issues. For those practitioners needing more information or guidance on transgender related issues, it is suggested that you refer to the article on transgender law written by Phyllis Frye that appeared in the Texas Bar Journal.

This presentation will cover a broad range of gay and lesbian legal topics, including, but not limited to, constitutional issues, family law issues, employment issues, real estate issues, and estate planning. Due to the breadth of this presentation, it will not be possible to focus on any one area in great depth. It is designed to present an overview and cover the most common legal concerns and issues which may arise for gay and lesbian clients.

I am a gay man living in a committed relationship with my partner for over eight years, and we have adopted two small children. It is important to acknowledge that there are a variety of gay and lesbian individuals whose lives and legal problems may not be similar to those of this author or the information presented. Being gay, lesbian, bi-sexual or transgender is as unique as the person who identifies within such categories. Just as there are not identical heterosexual individuals, there are also not identical gay or lesbian individuals. Each person's individual legal needs and personal situations are unique and should be addressed in order to best provide for that client's well-being. However, this presentation and paper have been prepared with a goal of providing some general suggestions and ideas so that practitioners have the tools to use in appropriate situations. Please do not interpret the information provided as being legal advice because it is not.

It should also be noted that those persons attending this presentation and reading this material may be doing so at various levels of understanding. Some persons may have never thought about or had the opportunity to experience gay, lesbian, bi-sexual or transgender clients, friends or family members. Accordingly, some of this material will be presented from a very basic standpoint. Hopefully this CLE material will cover areas which will be worthwhile to lawyers who are unfamiliar with the GLBT community as well as GLBT lawyers who are attending to obtain greater insight in providing legal services to their GLBT clients.

Finally, it is important to recognize that even in 2007, the presentation and discussion of GLBT issues is controversial to some persons. Nevertheless, we cannot deny that in 2007 there are many GLBT clients who need qualified and competent legal representation on various legal matters. Hence, this presentation and paper are designed to assist lawyers in providing better quality legal representation to the GLBT community.

II. GLOSSARY OF COMMON TERMS

In recognition of the fact that there may be attorneys in attendance who are not familiar with the gay, lesbian, bi-sexual, and transgender community or clients, I would like to present terminology that is often used in addressing and interacting with the GLBT community. The following terms are often used in GLBT legal matters:

1. “Gay” means a person who is sexually attracted to a person of the same gender. Gay is often associated with gay men, but some women also wish to be referred to as gay.
2. “Lesbian” means a female who is attracted to someone of the same female gender. This term is reserved exclusively for women and is not used for men who are attracted to other men.
3. “Heterosexual” means a person who is attracted to someone of the opposite gender.
4. “Homosexual” means a person who is attracted to someone of the same gender. This term would include the subcategories of “gay” and “lesbian.”
5. “Bi-sexual” means a person who is attracted to both persons of the same and different gender.
6. “Gender” means an individual’s self conception of being male or female. A person’s gender is usually the same as their sex, but not necessarily.
7. “Transgender” is a general term applied to a variety of individuals, behaviors, and groups involving tendencies that diverge from the normative gender role commonly assigned at birth, as well as the role traditionally held by society. It is the state of one’s “gender identity” (self-identification as male, female, both or neither) not matching one’s “assigned gender” (identification by others as male or female based on physical/genetic sex). “Transgender” does not imply any specific form of sexual orientation – transgender people may identify as heterosexual, homosexual, bisexual, parisexual or asexual.
8. “Coming out” means the acknowledgment of one’s sexual identity in a public way. The coming out process may be limited to immediate friends and family or may be expanded to work colleagues and the general public.

9. “Same sex marriage” means when two people of the same biological sex marry one another, and “marriage equality” means when same-sex couples have the same right to marry as opposite sex couples.

10. “Second parent adoption” means when one parent is the “legal” parent of a child either through adoption or childbirth and that person’s partner also wants to establish a legal relationship with the child, generally through adoption.

11. “Civil union” means that a couple obtains most or all of the licensing responsibilities and benefits of marriage available from a governmental entity without receiving the classification of “marriage.”

12. “GLBT” means gay, lesbian, bi-sexual, and transgender. The acronyms “GLBT” and “LGBT” are commonly accepted terms that encompass the gay, lesbian, bi-sexual and transgender community.

13. “Queer” has historically been a derogatory term to refer to the homosexual community, but in recent years, many in the GLBT community have attempted to adopt that term and present it in a positive light.

14. “Fag” has historically been a derogatory term to refer to a homosexual person, but in recent years, some in the GLBT community have attempted to adopt that term and present it in a positive light.

15. “Rainbow flag” means a flag recognized by the GLBT community as a symbol of pride and diversity and originating in 1978 in San Francisco. It is interesting to note that the rainbow flag has appeared using various basic colors of red, orange, yellow, green, blue, violet, and purple by various movements and societies over the years for different messages. The rainbow flag is not exclusively a GLBT pride and diversity flag. The rainbow flag is sometimes used as a peace flag and also the flag or banner of other groups, organizations, or countries. However, especially in the United States, the rainbow flag and the rainbow symbol has been accepted and acknowledged as a GLBT pride and diversity symbol.

III. HISTORY OF GAY RIGHTS MOVEMENT

The case law and statutes relating to the GLBT community correlate with the gay rights movement in general. Accordingly, in order to fully understand the legal issues affecting gay, lesbian, bi-sexual and transgender individuals, a brief review of the history of the gay rights movement is appropriate.

Gay Rights Movement Time Line

- | | |
|------|---|
| 1924 | First gay rights group is formed in Chicago: The Society for Human Rights. |
| 1948 | Alfred Kinsey publishes <i>Sexual Behavior in the Human Male</i> which presents sexuality on a continuum with 10% of the population exclusively homosexual, 10% of the population exclusively heterosexual, and the remaining 80% somewhere in between. |

1969	The Stonewall riots occur in a gay bar in New York City.
1973	The American Psychiatric Association removes homosexuality from its list of mental disorders.
1993	President Clinton institutes a new military policy on gays and lesbians known as “Don’t Ask, Don’t Tell.”
May 20, 1996	U.S. Supreme Court issues opinion in <i>Romer v. Evans</i> , 517 U.S. 620 (1996).
1996	Defense of Marriage Act becomes federal law via President Clinton’s signature.
2000	Vermont legalizes civil unions between same-sex couples.
June 26, 2003	U.S. Supreme Court issues opinion in <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).
2004	Same-sex marriage becomes legal in Massachusetts.
October 2005	Civil unions become legal in Connecticut.
November 9, 2005	Texas adopts “Texas Marriage Amendment” as Section 32 to the Texas Constitution.
December 2006	New Jersey adopts civil unions.

IV. THE UNITED STATES CONSTITUTION

1. Full Faith and Credit Clause; September 17, 1787

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

2. Amendment XIV. (1868)

All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. THE TEXAS CONSTITUTION

1. Article 1, Section 3a – EQUALITY UNDER THE LAW

Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative. (Added Nov. 7, 1972).

2. Article 1, Section 32 – MARRIAGE

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage. (Added Nov. 8, 2005).

VI. SIGNIFICANT GLBT CASES

1. *Loving v. Virginia*, 87 S.Ct. 1817 (1967). United States Supreme Court unanimously held Virginia law banning interracial marriage unconstitutional because racial classifications violate the central meaning of the Equal Protection Clause and because it violates the Due Process Clause (i.e., privacy and liberty) of the Fourteenth Amendment. Marriage was declared by the Court to be one of the “basic civil rights of man.”
2. *Roe v. Wade*, 410 U.S. 113 (1973). United States Supreme Court held a Texas criminal abortion statute unconstitutional under the Due Process Clause (i.e., privacy and liberty) of the Fourteenth Amendment. Supreme Court recognized a right of personal privacy and a zone of privacy.
3. *Bowers v. Hardwick*, 478 U.S. 186 (1986). United States Supreme Court held a Georgia criminal sodomy statute (applicable to sodomy acts of all people) constitutional. The Supreme Court expressly held that there is no due process (i.e., privacy or liberty) constitutional right for homosexuals to engage in sodomy under the United States Constitution.
4. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). United States Supreme Court held that “sexual stereotyping” may constitute unlawful sex discrimination in employment setting covered by Title VII. When a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by providing by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”
5. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). United States Supreme Court unanimously held that a Massachusetts law that requires private citizens who organize a parade to include among the marchers a [GLBT] group imparting a message the organizers do not wish to convey is unconstitutional under the First Amendment to the Constitution.

6. *Romer v. Evans*, 517 U.S. 620 (1996). United States Supreme Court held a Colorado constitutional amendment prohibiting all legislative, executive, and judicial action at any level of state or local government designed to protect homosexual persons from discrimination as unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. “The desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” A state cannot so deem a class of persons a stranger to its laws.”
7. *Littleton v. Prange*, 9 S.W.2d 223 (Tex. App. – San Antonio 1999). Texas appellate court held that no matter how a transsexual may change his or her body (either through hormonal treatment or surgery) the sex of a person at birth based on chromosomes is the legal sex of the person forever. As a male, her marriage to another male is void. There being no legal marriage, Ms. Littleton cannot maintain a medical malpractice suit as a “spouse.” Case dismissed.
8. *Boy Scouts of America v. James Dale*, 530 U.S. 640 (2000). United States Supreme Court held a New Jersey law unconstitutional which required the inclusion of unwanted (GLBT) persons in a group (the Boy Scouts) to infringe on the groups freedom of *expressive association* under the First Amendment of the Constitution. The First Amendment right of freedom of association includes a freedom not to associate with persons whom you do not wish to be included if that person’s presence affects in a significant way the group’s ability to advocate public or private viewpoints.
9. *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). United States Supreme Court held Texas law banning homosexual conduct unconstitutional and prior Supreme Court decision of *Bowers v. Hardwick* reversed. The court stated as follows:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *Casey, supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

The significance of *Lawrence v. Texas* can be summarized in four points:

1. Overturned *Bowers v. Hardwick*;
2. Declared all remaining “sodomy laws” unconstitutional throughout USA;

3. Established that morality alone is an insufficient basis for a criminal statute; and
 4. Discussed (for the first time) the constitutional protections applicable to homosexual adults to engage in intimate relationships and determine their own destiny without government interference.
10. *Goodridge v. Department of Public Health and Commissioner of Public Health*, 798 N.E2d 941 (2003). Supreme Court of Massachusetts held that refusal to issue same-sex couples marriage licenses declared unconstitutional under Massachusetts constitution. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.
 11. *Goodridge* case follow-up, 802 N.E.2d 565 (2004). Supreme Court of Massachusetts held civil union bill with same benefits, protections, rights, and responsibilities of marriage unconstitutional as not equal to "marriage". Same-sex marriage licenses began to be issued on May 17, 2004. The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual couples, to second-class status.
 12. *Lofton v. Secretary of the Department of Children and Family Services*, 2004 WL 161275 (11th Cir. Fla. 2004). Eleventh Circuit Court of Appeals upholds as constitutional a Florida statute which prevents adoption by "practicing homosexuals" over an equal protection and due process challenge in light of the *Lawrence v. Texas* decision. There is no "fundamental right" to be adopted, or to adopt children. Court held that *Lawrence v. Texas* did not identify a new fundamental right to private sexual intimacy. Florida's rational basis argument: disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida's interest in promoting adoption by marital families.
 13. *State of Kansas v. Matthew R. Limon*, 122 P.3d 22 (2005). Kansas Supreme Court held a Kansas statute which punished sodomy between adults and children of the opposite sex less severely than sodomy between adults and children of the same sex unconstitutional as a violation of the Equal Protection provisions of the federal and state constitutions (based on *Lawrence v. Texas* decision). "Moral disapproval of a group cannot be a legitimate governmental interest."
 14. *Donald Rumsfeld, et al. v. Forum for Academic and Institutional Rights, Inc.*, 2006 WL 521237 (2006). United States Supreme Court held (by unanimous decision) that the Solomon amendment (which requires campus access for military recruiters) is constitutional under the Constitution's grant to Congress of the power to provide for the common defense and to raise, support, provide, and maintain an army and navy. The Supreme Court also

found that the Solomon amendment does not violate the First Amendment because the Solomon amendment regulates conduct, not speech:

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. Of Oral Arg. 25 (Solicitor-General acknowledging that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests"). As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do – afford equal access to military recruiters – not what they may or may not say.

VII. MARRIAGE EQUALITY (SAME-SEX MARRIAGE)

1. Federal Defense of Marriage Act ("DOMA")
1 U.S.C. § 7
Signed into law by President Clinton on September 21, 1996

The following excerpts are the main provisions of the Federal DOMA:

Powers reserved to the states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Definition of 'marriage' and 'spouse':

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

2. Texas Defense of Marriage Act ("DOMA")
Section 1. Article 1, Texas Constitution, is amended by adding Section 32 to read as follows:

Sec. 32. (a) Marriage in this state shall consist only of the union of one man and one woman.
(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage. (Added November 8, 2005).

3. Texas Family Code § 6.204

The Texas Family Code makes it very clear that Texas does not recognize same-sex marriages or civil unions.

§ 6.2.04. Recognition of Same-Sex Marriage or Civil Union

- (a) In this section, “civil union” means any relationship status other than marriage that:
 - (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
 - (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
- (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
- (c) The state or an agency or political subdivision of the state may not give effect to a:
 - (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
 - (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

4. United States General Accounting Office Report by the Office of the General Counsel dated January 31, 1997.

1,049 federal laws classified in the United States Code in which marital status is a factor. The laws were classified on the list into the following 13 categories:

Social Security and Related Programs, Housing, and Food Stamps
Veterans’ Benefits
Taxation
Federal Civilian and Military Service Benefits
Employment Benefits and Related Laws
Immigration, Naturalization, and Aliens
Indians
Trade, Commerce, and Intellectual Property
Financial Disclosure and Conflict of Interest
Crimes and Family Violence
Loans, Guarantees, and Payments in Agriculture
Federal Natural Resources and Related Laws
Miscellaneous Laws

5. Marriage Equality Litigation

- A. *Loving v. Virginia*, 87 S.Ct. 1817 (1967). United States Supreme Court unanimously held Virginia law banning interracial marriage unconstitutional because racial classifications violate the central meaning of the Equal Protection Clause and because it violated the Due Process Clause (i.e.,

privacy and liberty) of the Fourteenth Amendment. Marriage was declared by the Court to be one of the “basic civil rights of man.”

- B. *Goodridge v. Department of Public Health and Commissioner of Public Health*, 798 N.E.2d 941 (2003). Supreme Court of Massachusetts held that refusal to issue same-sex couples marriage licenses declared unconstitutional under Massachusetts constitution. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.
- C. *Goodridge* case follow-up, 802 N.E.2d 565 (2004). Supreme Court of Massachusetts held civil union bill with same benefits, protections, rights, and responsibilities of marriage unconstitutional as not equal to “marriage”. Same-sex marriage licenses began to be issued on May 17, 2004.

The bill’s absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. The denomination of this difference by the separate opinion of Justice Sosman (separate opinion) as merely a “squabble over the name to be used” so clearly misses the point that further discussion appears to be useless. 440 Mass. at 1211, 802 N.E.2d at 572. If, as the separate opinion posits, the proponents of the bill believe that no message is conveyed by eschewing the word “marriage” and replacing it with “civil union” for same-sex “spouses,” we doubt that the attempt to circumvent the court’s decision in *Goodridge* would be so purposeful. For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex “spouses” only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as was explained in the *Goodridge* opinion, does not permit such invidious discrimination, no matter how well intentioned.

- D. Marriage equality cases are currently pending in California, Connecticut, and Iowa.

6. The U.S. Constitution's Full Faith and Credit Clause.

A. The U.S. Constitution's Full Faith and Credit Clause states as follows (in pertinent part):

Article IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Arts, Records and Proceedings shall be proved, and the Effect thereof.

B. Pursuant to Article IV, Section 1 of the Constitution, Congress enacted the following:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

C. *Baker v. General Motors Corporation*, 522 U.S. 222 (1998).

In the *Baker* decision, the Supreme Court makes it clear that judgments from one state are subject to the Constitution's Full Faith and Credit Clause and not subject to a "public policy exception."

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. "In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee County*, 296 U.S., at 277, 56 S.Ct., at 234. The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed. 940 (1939); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-819, 105 S.Ct. 2965, 2977-2978, 86 L.Ed.2d 628 (1985). Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force. See, e.g., *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 373, 116 S.Ct. 873, 878, 134 L.Ed.2d 6 (1996); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 102 S.Ct. 1883, 1899, 72 L.Ed.2d 262 (1982); see also

Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L.Rev. 153 (1949).

- D. Full Faith and Credit Provision recently applied in Oklahoma same-sex adoption case.

Oklahoma recently adopted the following statute relating to parent-child relationships:

§7502-1.4. Foreign adoptions

A. The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction. (Emphasis added).

Okl. Stat. tit. 10, § 7502-1.4(A) (the “adoption amendment”).

The above statute was challenged in *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). The Oklahoma statute was found by the Tenth Circuit Court of Appeals to be unconstitutional as a violation of the Constitution’s Full Faith and Credit provision. The court stated as follows:

The Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const. art. 4, § 1. The Supreme Court has often explained the purpose and policies behind the Full Faith and Credit Clause.

The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

The court declared the Oklahoma statute unconstitutional under the Full Faith and Credit Clause of the Constitution by stating as follows:

OSDH makes no persuasive argument as to why the Full Faith and Credit Clause of the Constitution should not apply to its recognition of out-of-state adoption orders. Indeed, many courts-including Oklahoma’s Supreme Court-have determined that the Full Faith and Credit Clause applies to valid adoption decrees from other states.

The validity of the Arkansas decree is not called in question, therefore the same is entitled to full faith and credit under the Federal Constitution, Art. 4, § 1. 1 Am.Jur. 627, sec. 10.

As stated in American Law Institute's Restatement of the Law of Conflict of Laws, sec. 143, "The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as its given by the latter state to the status of adoption when created by its own law." . . .

At issue here is a state statute providing for categorical non-recognition of a class of adoption decrees from other states, denying the "effective operation" of out-of-state adoption proceedings.

VIII. RELATIONSHIP DISSOLUTION

Even though gay and lesbian people are not permitted to legally marry in Texas at this time, that does not stop them from entering into marriage-like relationships, living together, commingling their funds, jointly purchasing real and personal property, having and raising children, and living their lives like other "married" couples.

However, when a legally married couple wants to end their marriage, they are required to get a divorce and follow the Family Code provisions applicable to the division of property, to custody of children, and many other aspects of concluding the marital relationship and becoming a single person. When you do not have a legal marriage, the ending of a relationship can be emotionally, legally, and financially difficult and expensive. The Family Code does not apply to the dissolution of a non-marital relationship, save and except when it affects the interest of children. Therefore, the dissolution of a gay or lesbian non-legally married relationship generally falls under concepts of business law, real property law, and other laws applicable to partnerships, trusts, and the joint ownership of real and personal property.

Legally married spouses may enter a pre-marital agreement to set certain terms and conditions which will govern financial and property matters in the event their marriage or relationship should end. Gay and lesbian individuals have that same opportunity although it is not usually called a prenuptial agreement. Gay and lesbian people can enter into "joint ownership agreements," "joint financial agreements," or "partnership agreements."

In any event, if the parties enter into a written agreement, such an agreement may control the disposition of the couples' assets in a break up. However, as with most legal marriage situations, most gay and lesbian people do not enter into any written agreements governing their relationship or their financial arrangement related thereto. Therefore, if and when the relationship should end, the individuals are left with general principles of business and civil law.

1. Statute of Fraud Implications

A. Chapter 26 of the Texas Business & Commerce Code

§ 26.01. PROMISE OR AGREEMENT MUST BE IN WRITING. (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and
(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to: . . .

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

B. *Zaremba v. Cliburn*, 949 S.W.2d 822, 826 (Tex. App. – Fort Worth Jul. 17, 1997), rehearing overruled (Aug. 07, 1997), writ denied (Apr. 30, 1998), rehearing of writ of error overruled (May 28, 1998).

Zaremba brought suit against his former partner, Cliburn, of 17 years for a share of his income for services provided, such as shopping, doing the mail, paying bills, drafting checks, co-managing the household, and dealing with accountants, creditors, and real estate agents. The trial court dismissed the case due to pleading errors. The court of appeals affirmed the dismissal of all claims based on consideration for nonmarital, conjugal cohabitation pursuant to the Texas statute of frauds.

2. Joint Ownership Agreements

Joint ownership agreements can be broad or specifically related to certain real property. Most often they relate to the purchase, management, and sale of specific real property. Such agreements often contain the following provisions:

- formation and term
- rights and obligations of owners
- scope of authority
- operation and management of real property
- accounting and distribution
- termination and buy/sell procedure
- dispute resolution process
- assignment and insurance provisions
- general contract term section

Without a written agreement, general principles of partnership, trust, joint venture, and equity may be employed by either party in post-relationship proceedings.

3. Partnership and Joint Ventures

The most common allegation in a dissolution of a same-sex relationship is that the parties entered into a partnership (since they are not permitted to marry). A general partnership is the most legally similar in nature to a marriage. In *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), the Texas Supreme Court described a general partnership and joint venture as follows:

Under the Texas Uniform Partnership Act, a partnership or joint venture is an association of two or more persons to carry on as co-owners a business for profit. Tex.Rev.Civ. Stat. Ann. art. 6132b, § 6. As the issue was submitted to the jury, a partnership consists of an

express or implied agreement containing four required elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. *See Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978).

A. *Small v. Harper*, 638 S.W.2d 24 (Tex. App. – Houston[1st Dist.] 1982, writ ref'd n.r.e.) is one of the few reported decisions involving the dissolution of a gay or lesbian relationship. Jo Ann Small brought suit against Aldean Harper to recover her claimed portions of lands and other property acquired over a period of 12-15 years. Ms. Small's main basis for her case is the alleged breach of an oral partnership, or alternatively as joint ventures, or a resulting trust, or constructive trust. The Texas Supreme Court in *Small* cited two older Texas cases involving unmarried women who had property claims against their former male partners. The two Texas Supreme Court cases are (1) *Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43 (1909), and (2) *Cluck v. Sheets*, 141 Tex. 219, 171 S.W.2d 860 (1943). In both cases, the Texas Supreme Court found that even though the womans' names were not on the deeds to the property, that the women raised a question of fact as to whether they would be entitled to an ownership interest in the land based on the money used to buy the land and/or her labor contributed to the purchase money.

Based on *Hayworth* and *Cluck*, the Houston Court of Appeals found that Texas did not have any public policy considerations which would bar Ms. Small from recovery on her claims. Accordingly, the summary judgment granted for the defendant was reversed and the case was remanded to the trial court for a full examination of the alleged facts.

B. *Harrington v. Harrington*, 742 S.W.2d 722 (Tex. App. – Houston [1st Dist.] 1987, no writ).

In many same-sex relationships, real property is purchased in one person's name, but it is the intention of both partners that the property would be jointly owned and operated. The case (although involving opposite sex individuals) contains some of the same facts often found with same-sex couples. The court made the following findings of fact:

The court further found that at the time of the purchase of the home, the parties agreed that title to the property would be taken in the appellant's name, at appellant's suggestion, for credit purposes and convenience only, but intended the residence to be owned, used, and enjoyed jointly . . .

The trial court concluded that the parties entered into an oral partnership/joint venture to own and occupy the home located on Talbot Street jointly; that they took title to the home in appellant's name for convenience and credit purposes only; and that the parties owned the home as tenants in common.

The court went on to describe the commonly recognized business relationship of partnership and joint venture as follows:

A partnership is generally defined as an association among two or more persons to carry on as co-owners a business for profit. *See, e.g.*, Tex.Rev.Civ.Stat. Ann. art. 6132b, sec. 6 (Vernon 1970). A joint venture is similar, but is generally limited to a single transaction. *C.C. Roddy, Inc. v. Carlisle*, 391 S.W.2d 765 (Tex. Civ. App. –

Fort Worth 1965, writ ref'd n.r.e.). In determining whether a partnership exists between spouses or cohabitants in the purchase or ownership of property, the parties' intent is an important factor. *Negrini v. Plus Two Advertising, Inc.*, 695 S.W.2d 624, 631 (Tex. App. – Houston [1st Dist.] 1985, no writ); *see also Cluck v. Sheets*, 141 Tex. 219, 171 S.W.2d 860 (1943); *Small v. Harper*, 638 S.W.2d 24 (Tex. App. – Houston [1st Dist.] 1982, writ ref'd n.r.e.).

The Court of Appeals affirmed the trial court's judgment (based on the evidence) and held:

“no abuse of discretion in the trial court's judgment that that property is owned by the parties as tenants in common, with each having an undivided one-half interest as separate property.”

4. Imposition of Trust and Confidential Relationship

Many same-sex couples purchase real and personal property in one person's name, when it is their mutual intent that the property be owned (to some degree) by both people. Sometimes the property is purchased with commingled funds, sometimes both persons contribute to the purchase, and sometimes only one person pays the money. Each circumstance is unique and sometimes the circumstances change from purchase to purchase. Over a period of years and numerous purchases, the financial and property ownership issues of a same-sex relationship can get very complicated.

Texas recognizes three types of trusts which may be applicable to property distribution situations:

- Express trust
- Resulting Trust
- Constructive Trust

As discussed above by the court in *Small v. Harper*, trust allegations can be made based on the conduct, verbal agreements, and other circumstantial evidence to prove the intent and agreements of the parties.

A. Express Trust

Section 112.001 of the Texas Property Code describes the methods for creating an express trust as follows:

§ 112.001. **Methods of Creating Trust**

A trust may be created by:

- (1) a property owner's declaration that the owner holds the property as trustee for another person;
- (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person;

- (3) a property owner's testamentary transfer to another person as trustee for a third person;
- (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or
- (5) promise to another person whose rights under the promise are to be held in trust for a third person.

Section 112.004 of the Texas Property Code also states that a trust in either real or personal property must be in writing to be enforceable.

§ 112.004. **Statute of Frauds**

A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent.

As will be more thoroughly explained below, resulting and constructive trusts arise by operation of law, and as such, are an exception to the statute of frauds defense.

B. Resulting Trust

A resulting trust is imposed by operation of law when one person pays the consideration for the purchase of property, and the title to the property is taken in the name of someone else. In *Nolana Development Assoc. v. Corsi*, 682 S.W.2d 246 (Tex. 1984), the Texas Supreme Court described resulting trusts as follows:

A resulting trust is implied in law when someone other than the person in whose name title is taken pays the purchase price, or when an express trust fails. *See Cohrs v. Scott*, 161 Tex. 111, 338 S.W.2d 127, 130 (1960); *Brelsford v. Scheltz*, 564 S.W.2d 404, 406 (Tex. Civ. App. – Houston [1st Dist.] 1978, writ ref'd n.r.e.); G. Bogert, *The Law of Trusts and Trustees* § 451 (Rev.2nd ed. 1977). The doctrine of resulting trust is invoked to prevent unjust enrichment, and equitable title will rest with the party furnishing the consideration or trust property when an express trust fails. The trustee of a resulting trust, however, like the trustee of a passive trust, generally is responsible only for conveying the property to the beneficiary or in accordance with his directions. *See Restatement (Second) of Trusts*, Ch. 12 Resulting Trusts General Principles (1957).

C. Constructive Trust

Finally, the last type of trust involves the breach of a confidential relationship and unfair, unjust, or fraudulent conduct. Since gay and lesbian people are unable to marry each other in Texas, this type of trust may be applicable to a couple that commingles their "family" assets, empowers each other through standard power of attorney documents, and then suffers a loss due to the unfair, unjust, or fraudulent conduct of one party against the other. The Court in *Hamblet v. Coveney*, 714

S.W.2d 126 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.) describes the constructive trust principles and the need for a confidential relationship in detail as follows:

Before a constructive trust can be imposed, there must be strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer. *Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977). Regarding the existence of a prior confidential relationship, the Texas Supreme Court, quoting from 54 Am.Jur. *Trusts* sec. 225, has stated:

While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of the declaration and enforcement of a constructive trust, *and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it. An abuse of confidence within the rule may be an abuse of either a technical fiduciary relationship or of an informal relationship where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one.*

(Emphasis in original). *Fitz-Gerald v. Hull*, 150 Tex. 39, 48, 237 S.W.2d 256, 261 (1951).

The court further stated:

It is not every relationship to which the term ‘fiduciary’ or ‘confidential’ can be applied with reason or plausibility, so as to raise a presumption of unfair dealings between the parties to the relationship. *It is a question of the actual relationship between the parties that must be inquired into*, and not whether the terms ‘fiduciary’, ‘confidential’, or ‘trust’ can, with some degree of reason, be applied to the relationship. *Id.* at 49, at 261.

To establish a constructive trust, it is not necessary to show fraud or intent not to perform an agreement when it was made. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 988 (1948) (quoting from 54 Am.Jur. *Trusts* sec. 233); *Thigpen v. Locke*, 363 S.W.2d 247 (Tex. 1962).

Finally, the confidential relationship must exist apart and prior to the transaction made the basis of the lawsuit. *Rankin*, 557 S.W.2d at 944; *Kostelnik v. Roberts*, 680 S.W.2d 532 (Tex. App. – Corpus Christi 1984, writ ref'd n.r.e.). Whether a confidential relationship existed between the parties is a fact question for the jury. *Garcia v. Fabela*, 673 S.W.2d 933 (Tex. App. – San Antonio 1984, no writ).

When a gay or lesbian relationship ends in litigation, many of the above vehicles are asserted (in the alternative). In addition to the foregoing, one may also assert fraud, breach of fiduciary duty, conversion, and civil theft.

In *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), the Texas Supreme Court further described the needed confidential relationship as follows:

An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 261 (1961). But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *See Crim Truck & Tractor Co. v. Navistar Int's Transp. Corp.*, 823 SW.2d 591, 594 (Tex. 1992). In order to give full force to contracts, we do not create such a relationship lightly. *See Thigpen*, 363 S.W.2d at 253. Accordingly, while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit. *See Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995). (Emphasis added).

As is stated above, the relationship had to exist prior to and apart from the agreement made the basis of the suit, in a business transaction. Obviously, two men or two women in an intimate relationship are not a business transaction. Therefore, the same requirements may not be required in a gay or lesbian personal relationship dissolution.

5. Partition of Jointly Owned Property

Once it is established that two unmarried persons own property together, then those persons are “co-tenants” or “tenants-in-common” in relation to such property. Thereafter, as co-owners, both persons have a mutual right of access to the property, and both persons have an absolute right to force a sale of the property, regardless of whether it is the homestead of either or both persons.

The right to partition and sale of property is found in Rule 770 of the Texas Rules of Civil Procedure and § 23.001 of the Texas Property Code. Rule 770 states as follows:

Rule 770. Property Incapable of Division

Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so orders, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests.

Section 23.001 of the Texas Property Code states as follows:

§ 23.001. Partition

A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

In *Thomas v. McNair*, 882 S.W.2d 870 (Tex. App. – Corpus Christi 1994, no writ), the court described the right of partition of co-tenants, and defenses which may be used against such forced sale, as follows:

A co-tenant may compel a partition of jointly owned real property. Tex.Prop.Code Ann. § 23.001 (Vernon 1984). The right to partition is absolute and was never intended to interfere, *per se*, with contracts, express or implied, between co-tenants modifying or limiting such right. *See Long v. Hitzelberger*, 602 S.W.2d 321, 322-323 (Tex. Civ. App. – Eastland 1980, no writ) (lease contract acted as implied agreement not to partition); *Benson v. Fox*, 589 S.W.2d 823, 825 (Tex. Civ. App. – Tyler 1979, no writ); *Odstrcil v. McGlaun*, 230 S.W.2d 353, 354-55 (Tex. Civ. App. – Eastland 1950, no writ) (By deed containing power of attorney granting full power to execute mineral leases, grantor impliedly agreed not to partition). Permissible defenses that a defendant in a partition suit may urge include any matter operating as an estoppel against the plaintiff. An express agreement not to partition will be honored by the courts, and an agreement against partitioning will be implied when the granting of such relief would destroy the estate sought to be partitioned. *See Benson v. Fox*, 589 S.W.2d at 825 (no express agreement not to partition, and expense to relocate mobile homes does not constitute destruction of estate); *Lichtenstein v. Lichtenstein Bldg. Corp.*, 442 S.W.2d 765, 769 (Tex. Civ. App. – Corpus Christi 1969, no writ) (lease, deed of trust, and note do not amount to an implied agreement not to partition).

In order to avoid the cost and ultimate loss associated with a forced partition, receivership, and court proceedings, most couples are wise to try to settle their property dispute through mediation. Otherwise, any equity the couple had in the property might be lost to receiver fees, commissions, court costs, and legal fees.

6. Bank Accounts

In addition to real and personal property, couples also often have bank accounts which contain joint funds. The Texas Probate Code addresses these joint accounts as follows:

§ 438. Ownership During Lifetime

- (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

One advantage to not being married is that one partner is not automatically liable for the other partner's debts, such as in overdraft situations. *Williams v. Cullen Center Bank & Trust*, 685 S.W.2d 311 (Tex. 1985).

7. Gift

One of the most difficult areas to accept is the legal consequences of making a gift. Gifts are usually given out of love and affection. However, after a gift is made, the donee loses the right to get the gift back even if the personal relationship or circumstances change between the parties.

What constitutes a gift (versus a loan, or a promise to make a gift, which is not enforceable)?

A gift can be made of personal or real property. The court in *Troxel v. Bishop*, 201 S.W.3d 290 (Tex. App. – Dallas 2006, no pet.h.) set forth the principles related to making an effective gift as follows:

The three elements constituting a gift are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. *Id.* All dominion and control over the property must be released by the owner. *Id.* The one claiming the gift has the burden of establishing these elements. *Id.* A gift of realty can be made in two ways: either by deed or by parol gift. *Id.*

Title to transferred property will vest upon execution and delivery of a deed. *Rothrock v. Rothrock*, 104 S.W.3d 135, 138 (Tex. App. – Waco 2003, pet. denied) (citing *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974)). The question of delivery of the deed, being controlled by the intent of the grantor, is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument. *Id.* However, proof that a deed was filed of record establishes a prima facie case of delivery and the accompanying presumption that the grantor intended to convey the land according to the terms of the deed. *Id.* On the other hand, this latter presumption – that a deed was intended to be operative as a conveyance according to its terms – may be overcome by evidence that: (1) the deed as delivered or recorded for a different purpose, (2) fraud, accident, or mistake accompanied the delivery or recording, or (3) the grantor had no intention of divesting himself of title. *Id.*

There are three requisites to uphold a parol gift of realty in equity: (1) a gift in praesenti, (2) possession under the gift by the donee with the donor's consent, and (3) permanent and valuable improvements made on the property by the donee with the donor's knowledge or consent or, without improvements, the existence of such facts as would make it a fraud upon the donee not to enforce the gift. *Thompson*, 746 S.W.2d at 825; *see also Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1116 (1921). "In praesenti" means at the present time; it is used in opposition to "in futuro." *Thompson*, 746 S.W.2d at 825. Thus, to be a gift in praesenti, the donor must, at the time he makes it, intend an immediate divestiture of the rights of ownership out of himself and a consequent immediate vesting of such rights in the donee. *Id.* The donee's possession must be in the nature of an owner's

right to control. *Id.* An effective parol gift of real property is not in violation of the statutes of fraud. *Whitten v. Dethloff*, 214 S.W.2d 480, 484 (Tex. Civ. App. – Fort Worth 1848, no writ) (citing then-effective statutes of fraud and conveyancing).

IX. FAMILY CREATION

Those gay and lesbian couples that wish to create a family with children may do so in the following ways:

1. Domestic adoption;
2. International adoption.
3. Reproductive assistance through a sperm bank, sperm donor, or volunteer participation; or
4. Reproductive assistance through a surrogate.

1. Adoption

Adoption is a common means by which gay and lesbian individuals and couples have children. Most international adoptions prohibit gay couples from adopting as a couple. Therefore, a gay or lesbian individual may adopt internationally, and then when he or she returns home with the child, the other gay or lesbian partner may adopt the child domestically. Often, both partners re-adopt the child in order to get a United States birth certificate. In any event, there are a variety of methods by which gay or lesbian individuals can obtain children to raise. Most arrangements involve a single gay person as the initial legal parent (whether through birth or adoption), followed by a “second-parent adoption.” Thereafter, Texas permits adoption by individual gay and lesbian people, but is silent as to adoption by gay and lesbian (unmarried) couples. The Texas Family Code describes who can adopt as follows (in pertinent part):

§ 102.005. Standing to Request Termination and Adoption

An original suit requesting only an adoption or termination of the parent-child relationship joined with a petition for adoption may be filed by:

- (1) a stepparent of the child;
- (2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
- (3) An adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition; or**
- (4) Another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

SUBCHAPTER A. ADOPTION OF A CHILD

§ 162.001. Who May Adopt and be Adopted

(a) Subject to the requirements for standing to sue in Chapter 102, an adult may petition to adopt a child who may be adopted.

- (b) A child residing in this state may be adopted if:
- (1) the parent-child relationship as to each living parent of the child has been terminated or a suit for termination is joined with the suit for adoption . . .

The Family Code appears to be silent as to the authority for same-sex partners to petition for adoption. Accordingly, some courts permit such adoptions, and others do not. Once an adoption has been granted, it cannot be attacked after the expiration of six months from the date of adoption based on § 162.012 of the Texas Family Code.

§ 162.012. Direct or Collateral Attack

(a) **Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an adoption order is not subject to attack after six months after the date the order was signed.**

(b) **The validity of a final adoption order is not subject to attack because a health, social, educational, and genetic history was not filed. (Emphasis added).**

Two recent adoption cases describe the current status of gay and lesbian adoptions in Texas.

A. *Hobbs v. Van Stavern*, 2006 WL 3095439 (Tex. App. – Houston [1st Dist.] 2006; petition for review filed January 22, 2007; unreported).

In *Hobbs*, one parent was the biological mother of the child born in 1998. In 2001, the sperm donor's parental rights were terminated and the lesbian partner of the biological mother adopted the child. The adoption petition was filed by both partners requesting the adoption by the non-biological partner. Adoption was granted in 2001. In 2004, the women broke up and moved apart. The non-biological parent filed a petition seeking joint managing conservatorship. A jury found that the women should be joint managing conservators and the court entered an order in accordance with the jury's decision.

The appellate court found that since the attack on the adoption was not filed within six months from the date of the adoption, the biological mother's attempt to attack the adoption on any grounds must fail. The appellate decision stated as follows:

Family Code section 162.012, provides, in relevant part, as follows:

§ 162.012. Direct or Collateral Attack

(a) Notwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an adoption order is not subject to attack after six months after the date the order was signed.

Id. § 162.012(a) (Vernon 2002). Here, Julie's attack on the adoption order came nearly three years after it was signed, well past the six-month limitation. In her briefing, Julie offers no argument to refute specifically Kathleen's defense that section 162.012(a) bars Julie's attack on the adoption order. Our own research reveals no authority indicating that the plain language of section 162.012(a) would not control. The Texas Legislature made no exceptions to the six-month limitation—not for challenges to purportedly void adoption orders, not for good cause, and not for public policy reasons. *See id.* We conclude that section 162.012(a) precluded Julie's attack on the validity of the adoption order. *See id.*; *see also In Re C.R.P.*, 192 S.W.3d 823, 826 (Tex. App. – Fort Worth 2006, no pet.).

The court determined that finality of adoption orders is an important public policy embodied in the Family Code.

B. *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App. – Austin 2007, petition for review filed April 16, 2007).

In *Goodson*, Elizabeth Goodson adopted a three year old child in Kazakstan in 2000. Upon returning to Texas, the lesbian couple filed a joint petition for adoption in Bexar County and the adoption was granted in 2001. In 2002, the women ended their relationship. Castellanos filed for custody of the child. After a trial, a jury determined that Castellanos should be appointed sole managing conservator. The court entered an order as such, and ordered Goodson to pay Castellanos \$788.00 a month child support, plus \$45,854.41 in attorney's fees to Castellanos. On the same day, the court also released an opinion that two members of the same sex may not jointly adopt a child under Texas law. Goodson appealed.

The Court of Appeals affirmed the trial court's judgment, save and except as to the amount of attorney fees awarded to the amicus attorney appointed on the case.

The appellate court affirmed the decision based on the following:

1. Section 162.012 of the Family Code prohibits an attack on an adoption after six months. The Court said:

The justifications in favor of this decision are numerous. To encourage adoptions, adoptive parents should be assured that, after a reasonable amount of time, their parental claims may not be brutally revoked due to a procedural error, birth parents changing their mind years later, or a change in relationship with another parent. The destruction of a parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing parent-child relationship is in the best interest of the child.

2. Adoptions by two persons of the same sex is not against public policy.

However, there is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex . . .

Accordingly, any concern with the propriety of this adoption must yield to the directly stated public policy of this State prohibiting a direct or collateral attack on a judgment more than six months after an adoption is ordered and providing children with a stable home environment. *See* Tex. Fam. Code Ann. §§ 162.012 (six-month deadline); 153.001 (overall public policy of State); *Wristern v. Kosel*, 742 S.W.2d 868, 870 (Tex. App. – Eastland 1987, writ denied) (when both parents love child, public interest is neither directly or adversely affected by question of which parent is appointed managing conservator of child); *see also Van Stavern*, ___ S.W.3d at ___, 2006 WL 3095439, at *3, 2006 Tex. App. LEXIS 9529, at *9-10 (rejecting argument that appointment of both members of same-sex couple as joint managing conservators violated public policy).

3. Goodson was estopped to contest the adoption due to her role in requesting it.

Finally, in arguing that the adaption is void, Goodson would have us ignore her role in the adoption of K.G. by Castellanos. Goodson and Castellanos together hired a lawyer for the purpose of making Castellanos a co-equal legal parent of K.G. and filed a joint petition for the adoption of K.G. Importantly, K.G. regards both Goodson and Castellanos as his parents, and the three of them lived as a family for years. It would be inequitable and unconscionable to allow Goodson to invoke the jurisdiction of a court for the sole purpose of creating a parent-child relationship between Castellanos and K.G. and then subsequently allow her to destroy that same relationship because her relationship with Castellanos had ended.

This case is still on appeal and the parties are waiting to see if the Texas Supreme Court will hear this case.

C. Birth Certificates

Although there are no Texas statutes or cases which prohibit a same-sex couple from adopting a child, the Texas Health and Safety Code has restrictions which prohibit two parents of the same sex being listed on the birth certificate. Section 192.008 of the Texas Health and Safety Code states as follows:

§ 192.008. BIRTH RECORDS OF ADOPTED PERSON. (a) The supplementary birth certificate of an adopted child must be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father. This subsection does not prohibit a single individual, male or female, from adopting a child. Copies of the child's birth certificates or birth records may not disclose that the child is adopted.

D. Adult Adoption

Texas permits adult adoptions. One adult may adopt another adult with the consent and participation of the adult being adopted. Section 162.507 of the Texas Family Code describes the effect of such adult adoption as follows:

§ 162.507. Effect of Adoption

- (a) The adopted adult is the son or daughter of the adoptive parents for all purposes.
- (b) The adopted adult is entitled to inherit from and through the adopted adult's adoptive parents as though the adopted adult were the biological child of the adoptive parents.
- (c) The adopted adult may not inherit from or through the adult's biological parents. A biological parent may not inherit from or through an adopted adult.

2. Surrogacy

An alternative to adoption is surrogacy. Surrogacy can be accomplished in a variety of ways and using a variety of assisted reproductive means such as

- donated egg
- donated sperm
- donated egg and sperm
- use of womb

- A. Texas permits/allows limited assisted reproduction pursuant to Section 160.71 – 160.763 of the Texas Family Code under the following parameters:

1. A gestational mother may not use her own genetic material and have the agreement pre-approved by the court.
2. The intended parents must be married and both parents must be a party to the gestational agreement (to be pre-approved by the court).
3. There are technical rules found in the Texas Family Code which govern gestational agreements.
4. Surrogacy agreements which involve the surrogate's genetic material are not covered by statute and may be revoked by the surrogate mother prior to termination of parental rights.

B. Sperm Donors

The Texas Family Code makes it clear that sperm “donors” are not a parent of their offspring. § 160.702 of the Texas Family Code states as follows:

§ 160.702. Parental Status of Donor

A donor is not a parent of a child conceived by means of assisted reproduction.

In the recent case of *In the Interest of H.C.S., a child*, 219 S.W.3d 33 (Tex. App. – San Antonio 2006, no writ), the court upheld the parental status of donor statute as follows:

K.D. contends J.S. lacks standing because as a donor, he is not a parent. Section 160.702 of the Family Code states that “[a] donor is not a parent of a child conceived by means of assisted reproduction.” Tex.Fam.Code Ann. § 160.702 (Vernon Supp. 2006). It is undisputed that H.C.S. was conceived by means of assisted reproduction, and that J.S. was the sperm donor for the reproduction . . .

While we acknowledge the scholarly research reflected in the *Sullivan* opinion, we respectfully disagree with the court’s conclusion that status as a donor is irrelevant to the question of standing to establish parentage. We likewise do not agree that donor status is more appropriately addressed at the merits stage of the litigation. To the contrary, based on the plain language of the Family Code as set forth below, we conclude that J.S., as an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, does not have standing to pursue a suit to determine paternity of the child born through the assisted reproduction.

Although the statute and case law are clear that a donor is not a parent, the definition of “donor” was recently amended by the Texas legislature, effective September 1, 2007.

“Donor” is now defined in Texas as follows:

Subchapter B – General Provisions

§ 160.102. DEFINITIONS – AMENDED

(6) “Donor” means an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration. The term does not include:

(A) a husband who provides sperm or a wife who provides eggs to be used for assisted reproduction by the wife;

(B) a woman who gives birth to a child by means of assisted reproduction; or

(C) an unmarried man who, with the intent to be the father of the resulting child, provides sperm to be used for assisted reproduction by an unmarried woman, as provided by Section 160.7031.

Source: SB 228

Last Action: Signed by Governor 6-16-07 - Effective 9-1-07.

Additionally, the law in Texas has also changed to the extent that a sperm donor may be the legal father of the child, if the conditions described in the new Section 160.7031 of the Texas Family Code are followed:

Subchapter H – Child of Assisted Reproduction

§ 160.7031. UNMARRIED MAN’S PATERNITY OF CHILD OF ASSISTED REPRODUCTION – ADDED

(a) If an unmarried man, with the intent to be the father of a resulting child, provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unmarried woman, he is the father of a resulting child,

(b) Consent by an unmarried man who intends to be the father of a resulting child in accordance with this section must be in a record signed by the man and the unmarried woman and kept by a licensed physician.

Source: SB 228

Last Action: Signed by Governor 6-15-07 - Effective 9-1-07.

Texas law on surrogacy is developing, but it has a long way to go to catch up with other states. Many companies located in other states offer surrogacy services to gay and lesbian couples.

X. EMPLOYMENT

Texas is an at-will employment state. That means that the employment relationship can be terminated by the employer or employee at any time without notice, reason, or penalty. The only exceptions to the employment at-will doctrine are:

- employment contract
- discrimination due to membership in a recognized protected group like race, sex, color, national origin, age, or disability
- refusal to perform a criminal act
- whistle blower violation

1. Sexual Orientation Is Not a Recognized Protected Group

It is well settled that there is no federal or state law (at this time) that prohibits employment discrimination based solely on sexual orientation. In *Hammer v. St. Vincent Hospital and Health Care Center*, 224 F.3d 701 (7th Cir. 2000), the court summarized the current status of the law as follows:

Title VII prohibits employers from harassing employees “because of [their] sex.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); 42 U.S.C. § 2000e-2(a)(1). Same-sex sexual harassment is actionable under Title VII “to the extent that it occurs ‘because of’ the plaintiff’s sex.” *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir. 1999). “The phrase in Title VII prohibiting discrimination based on sex” means that “it is unlawful to discriminate against women because they are women and against men because they are men.” *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). In other words, Congress intended the term “sex” to mean “biological male or biological female,” and not one’s sexuality or sexual orientation. *See id.* at 1087. Therefore, harassment based solely upon a person’s sexual preference or orientation (and not one’s sex) is not an unlawful employment practice under Title VII. *Id.* at 1085.

However, a move is currently underway to pass a new federal law which would add “actual or perceived sexual orientation” to the list of protected groups.

2. Employment Non-Discrimination Act of 2007

The main substance of the proposed ENDA legislation reads as follows:

H.R. 3685

Employment Non-Discrimination Act of 2007 (Introduced in House)

Sec. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.

(a) Employer Practices – It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual’s actual or perceived sexual orientation.

One controversial aspect of the proposed ENDA legislation is whether or not to include gender identity as part of the protected group. An amendment to add gender identity to the ENDA bill will be introduced in Congress.

3. Same-Sex Sexual Harassment

In 1998, the United States Supreme Court recognized a new potential cause of action for same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

In a unanimous decision, written by Justice Scalia, the Supreme Court held as follows:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discrimat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

The *Oncale* decision has been followed and applied in subsequent same-sex sexual harassment cases, but its scope has been somewhat limited. The court in *Willborn v. Formosa Plastics Corporation of Texas*, 2005 WL 1797022 (Tex. App. – Corpus Christi 2005) sets forth the three ways a plaintiff could show a violation of Title VII for same-sex sexual harassment as follows:

Same-sex sexual harassment is likewise actionable under Title VII. *See Oncale*, 523 U.S. at 81. Under *Oncale* to prove same-sex sexual harassment, the complaint may: (1) show that the alleged harasser made “explicit or implicit proposals of sexual activity” and provide credible evidence that the harasser was homosexual; (2) demonstrate that the harasser was “motivated by general hostility to the presence of

[members of the same sex] in the workplace; or (3) offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. *See Oncale, Inc.*, 523 U.S. at 8-81. “Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex.” *Oncale*, 523 U.S. at 81.

4. Sex Discrimination Based on Male and Female Stereotypes

In 1989, the United States Supreme Court held that gender stereotyping may constitute unlawful sex discrimination.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). United States Supreme Court held that “sexual stereotyping” may constitute unlawful sex discrimination in an employment setting covered by Title VII. When a plaintiff in a Title VII case provides that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by providing by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”

Although there is established case law that Title VII does not protect transgendered or transsexual individuals, recent cases filed by such persons based on the *Price Waterhouse* principles have been successful.

For example, the court in *Jane Doe v. United Consumer Financial Services*, 2001 WL 34350174 (N.D. Ohio 2001) held as follows:

The question of how this seemingly straightforward prohibition applies to transsexuals is a complex one. Defendant points out that all federal courts that have squarely addressed this issue have held that Title VII does not prohibit discrimination based on an individual’s transsexualism. *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977). Basing their analysis on plain language and Congressional intent, these courts (hereinafter collectively referred to as “Ulane”) found that Congress “had a narrow view of sex in mind” and “never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.” *Ulane*, 742 F.2d at 1085-86.

Doe argues, however, that *Ulane* does not apply here, because she is not alleging discrimination based on transsexuality per se; rather, she asserts that United Consumer engaged in “sexual stereotyping” prohibited by *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse*, a female senior manager was being considered for partner in a nationwide professional accounting partnership. *Id.* at 232. The Court found that, in part, she was denied partnership because she was considered not “feminine enough” in dress and behavior. *Id.* at 235. Finding that such conduct amounted to prohibited “sex stereotyping,” the Court noted, “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” *Id.* at 251 (citation omitted).

Similarly, Doe here alleges that United Consumer fired her because her appearance and behavior did not meet the company's sex stereotypes; United Consumer either viewed her as a man who dressed and behaved like a woman, or it considered her a woman who was insufficiently feminine. Either way, Doe asserts, United Consumer's sex stereotyping violated Title VII . . .

Accordingly, since Doe may have been fired, at least in part, because her appearance and behavior did not fit into her company's sex stereotypes, rather than solely because of her transgendered status, dismissal of Doe's Title VII claims is not warranted.

Courts have not expanded Title VII to specifically include transgendered employees. Instead, a transgendered plaintiff might have a cause of action if he or she could prove that the employment termination was based on sexual stereotyping. For example, the court in *Creed v. Family Express Corporation*, 2007 WL 2265630 (N.D. Ind. 2007) explained the distinction as follows:

Still, the court doesn't read *PriceWaterhouse v. Hopkins* to provide a cause of action based solely on a plaintiff's transgender status. The *PriceWaterhouse* Court focused on the situation in which initiative, effort, and aggressiveness were rewarded with partnership for men, but the company then punished women who exhibited these "macho" traits. *PriceWaterhouse v. Hopkins*, 490 U.S. at 251. It was the disparate treatment of men and women by sex stereotype that violated Title VII . . . Second, a transgender plaintiff can state a sex stereotyping claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer, but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perspectives.

Under any circumstance, an employment discrimination case is difficult for a plaintiff to win. If ENDA becomes law (and especially if it includes protections for gender identity) gay, lesbian, bisexual, and transgender employees will have an opportunity to bring suit for employment discrimination. Otherwise, the GLBT community will continue to work at the mercy of discriminating employers.

XI. REAL ESTATE

Many gay and lesbian couples purchase real estate together. Sometimes one person owns real estate and invites his or her partner to move in and eventually the partner is also invited to be a co-owner. Sometimes the partner never becomes a co-owner and is simply a tenant at sufferance. In any event, same-sex couples and real estate situations often create complicated and tricky legal situations.

1. Landlord-Tenant Relationship

When one partner owns real property and his or her partner moves in and starts paying rent and one-half of the utilities, a landlord-tenant relationship may be established, even with no written lease.

A “lease” is defined by § 92.001 of the Texas Property Code as follows:

(3) “Lease” means any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling.

Once a landlord-tenant relationship exists under a lease (written or oral), all of the rights, obligations, duties, and penalties of the Property Code become applicable.

One of the major aspects of a landlord-tenant relationship is the requirement to go to justice court to have someone leave a leased premises. A landlord cannot simply lock the door and kick a tenant out without subjecting the landlord to liability, penalties, and possible damages.

There are other notice, security, and payment obligations on a landlord once the landlord-tenant relationship exists. The landlord also has tax disclosure obligations to the IRS regarding the reporting of rental income.

2. Purchasing Real Property Together

Gay and lesbian couples are free to buy real property together. They can do this in one of two ways:

- as co-tenants, or
- as joint owners with rights of survivorship.

A. If the couple purchases the real property as co-tenants, all of the co-tenancy rules apply, including, the right to force a partition of the property, regardless of homestead status of the property.

B. If the couple purchase the real property as joint tenants with the right of survivorship, they need to have a written agreement pursuant to § 46 of the Texas Probate Code. Joint tenants with the right of survivorship are also co-tenants.

Section 46 of the Texas Probate Code states as follows:

§ 46. Joint Tenancies.

(a) If two or more persons hold an interest in property jointly, and one joint owner dies before severance, the interest of the decedent in the joint estate shall not survive to the remaining joint owner or owners but shall pass by will or intestacy from the decedent as if the decedent’s interest had been severed. The joint owners may agree in writing, however, that the interest of any joint owner who dies shall survive to the surviving joint owner or owners, but, no such agreement shall be inferred from the mere fact that the property is held in joint ownership.

(b) Subsection (a) does not apply to agreements between spouses regarding their community property. Agreements between spouses

regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code.

The following is a sample deed where the gay couple purchased real property as joint tenants with right of survivorship:

GENERAL WARRANTY DEED
(Third Party Financed)

Texas Property Code Section 11.008
CONFIDENTIAL INFORMATION IN REAL PROPERTY RECORDS

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER’S LICENSE NUMBER.

THE STATE OF TEXAS §
 § KNOW ALL BY THESE PRESENTS:
COUNTY OF HARRIS §

THAT _____, hereinafter called “Grantor,” for and in consideration of the sum of **TEN AND NO/100 DOLLARS (\$10.00)** and other good and valuable consideration to Grantor in hand paid by _____ and _____, **unmarried persons, as joint tenants with the right of survivorship**, hereinafter called “Grantees,” whose mailing address is XXXXX, the receipt and sufficiency of which is hereby acknowledged and confessed, and for the further consideration of the execution and delivery by said Grantees of one certain Promissory Note in the original principal sum of **XXXXX**, bearing even date herewith, payable to the order of **XXXXX**, hereinafter called "Mortgagee", bearing interest at the rate therein provided; said Note containing an attorney's fee clause and various acceleration of maturity clauses in case of default, and being secured by the Vendor's Lien and Superior Title retained herein in favor of said Grantor and assigned to Mortgagee, and also being secured by a Deed of Trust of even date herewith from Grantees to **XXXXX**, Trustee;

HAS GRANTED, SOLD AND CONVEYED, and by these presents does GRANT, SELL AND CONVEY, unto said Grantees, the following described real property, to-wit:

XXXXX OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS,

TO HAVE AND TO HOLD the above described premises, together with, all and singular, the rights and appurtenances thereunto in anywise belonging, unto the said Grantees, Grantees’ heirs, executors and administrators and Grantor do hereby bind Grantor, Grantor’s successors and assigns, to **WARRANT AND FOREVER DEFEND**, all and singular, the said premises unto the said Grantees, Grantees' heirs, executors and administrators, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

WHEREAS, Mortgagee has, at the special instance and request of Grantees, paid to Grantor a portion of the purchase price of the property hereinafter described, as evidenced by the above described Note, Grantor hereby retains and reserves a Vendor's Lien and Superior Title against the property conveyed for the purpose of securing the payment of said Note, and hereby assigns, transfers and delivers the Vendor's Lien and Superior Title to the property without recourse to Mortgagee, subrogating said Mortgagee to all the rights and remedies of Grantor in the premises by virtue of said lien; Mortgagee shall retain the Vendor's Lien and Superior Title until the Note and all interest thereon has been fully paid, when this Deed shall become absolute.

Current ad valorem taxes have been prorated and the payment of same is assumed by Grantees.

This Deed is executed, delivered and accepted subject to, all and singular, any liens securing the payment of any debt created in connection herewith and described herein, ad valorem taxes for the current and all subsequent years, zoning ordinances and utility district assessments, if any, applicable to and enforceable against the above described property, and all valid easements, restrictions, covenants, mineral royalties, mineral grants, or mineral reservations and maintenance fund liens, if any, applicable to and enforceable against the above described property as shown by the records of the County Clerk of the County in which said real property is located.

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantees have joined in the execution of this instrument to evidence their agreement with each other that they shall own the above described real property as joint tenants with right of survivorship. If no severance occurs before the death of either Grantee, then on the death of either Grantee the interest of the deceased Grantee will pass to and vest in the surviving Grantee. This agreement is binding on Grantees' respective heirs, executors, and personal representatives.

Executed effective this _____ day of _____, 2007.

By: _____

Name: _____

Its: _____

ACCEPTED BY GRANTEES AS
JOINT TENANTS WITH RIGHT
OF SURVIVORSHIP:

If one person purchased property and later wants to give or sell a portion of that property to his or her new partner, the original owner need only execute and record a deed to do so. However, some caution is in order before the deed is executed. Here are some points to keep in mind:

1. Once given or sold, it is hard to get back.
2. The conveyance may violate a "due on sale" clause in the existing deed of trust (mortgage).
3. The title insurance purchased in the original transaction may not cover the interest of the new owner.
4. Don't convey an interest in the property without an assumption of the underlying debt.
5. Once co-tenancy is established, either owner can compel a sale of the property at any time.
6. If the new owner dies and does not convey his or her interest to the original owner, then the original owner may be a co-tenant with the deceased owner's heirs at law (unless the couple owned the property as joint tenants with right of survivorship).

Here is a sample survivorship agreement (if it is not contained in the deed):

SURVIVORSHIP AGREEMENT
(Pursuant to § 46(a), Texas Probate Code)

Date: January _____, 2007

Owners: _____ and _____

Property: Lot _____ in Block _____, of _____, Section _____, an addition in Harris County, Texas, according to the map or plat thereof recorded in Volume _____, Page _____ of the Map Records of Harris County, Texas ("property").

_____ and _____ (collectively "Owner" and "Owners") of the above referenced property, own the property jointly and for valuable consideration agree with each other as follows:

1. If no severance or conveyance of the property occurs before the death of any Owner, then on the death of either Owner, the interest of the joint Owner who first dies shall survive to the surviving joint Owner.
2. Owners will after this date own the property in the same manner as joint tenants with right of survivorship.
3. This agreement is binding on Owners and Owners' respective heirs and personal representatives.

visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage.”). (Emphasis added).

1. Estate Planning Documents

Texas recognizes the following estate planning documents which are vital to gay and lesbian individuals and especially GLBT couples who are prohibited from marrying:

- A. Directive to Physicians
§ 166.033, Texas Health and Safety Code
- B. Medical Power of Attorney
§ 166.163, Texas Health and Safety Code
- C. Declaration of Guardian
§ 679, Texas Probate Code
- D. Business Power of Attorney
§ 490, Texas Probate Code
- E. Designation of Agent for Disposition of Remains
§ 711.004, Texas Probate Code
- F. HIPAA Authorization for Medical Records
45 C.F.R. § 164.508
- G. Hospital Visitation Authorization
- H. Last Will and Testament
§ 59, Texas Probate Code

The execution of all of the above estate planning documents will help a GLBT couple protect their directions applicable to their estates, personal preferences, and final dispositions. Without the above documents, the Texas legislature’s presumed dispositions will control. Without the above documents, a 40 year intimate relationship between two men or two women will be considered by the courts as meaningless and irrelevant.

2. Contestability of Estate Documents

Even with all eight estate documents properly executed, gay and lesbian people run the risk of someone contesting their competency or state of mind. For example, in *Evans v. May*, 923 S.W.2d 712 (Tex. App. – Houston [1st Dist.] 1996, writ denied), the sister of a deceased gay man who filed a contest to her brother’s will. The testator’s will left everything to his “lifemate” of over 30 years. One of the grounds asserted by the sister to contest the will was that by living together for over 30 years, the surviving partner had the opportunity to exert undue influence over his deceased lifemate. The court stated as follows:

Undue Influence

Evans' third point of error argues the trial court erred in admitting the decedent's will to probate because the evidence shows, as a matter of law, the decedent was unduly influenced by May. It is undisputed that May and the decedent lived together for over 30 years and had a "special" relationship. The attorney who prepared the will, Ruth Russell Schaefer, testified they were "lifemates." Evans argues 30 years of living together provided the opportunity for May to exert undue influence over the decedent and suggests that the decedent and May's relationship as "lifemates" attempts to describe "an unnatural and an unrecognized legal relationship." There was no testimony as to what type of relationship the decedent and May had other than that they were "lifemates"; however, regardless of the type of relationship, the elements of undue influence must exist in order to prevail on a claim of undue influence . . .

Furthermore, we decline to hold that May's 30-year relationship as the decedent's "lifemate" constitutes undue influence as a matter of law.

Suggestions to help avoid or defeat a will contest include the following:

- A. Interact with a GLBT couple as separate individuals:
 - private consultations
 - separate files
 - separate execution ceremonies
 - separate modes of payment
 - B. Have medical exam concurrent with execution of estate planning documents.
 - C. Execute similar or duplicate documents over a period of time (6 months – 1 year).
 - D. Include a bequest to one that may contest, and include a no-contest clause.
 - E. Use three witnesses.
 - F. Have testator initial all pages of will.
3. Alternatives to Estate Documents (or in addition to them)

There are a number of means by which GLBT individuals and couples can achieve their desired results without use of certain estate planning documents. Here are some alternatives:

- A. Joint bank accounts.
- B. Joint tenancy with right of survivorship on land, bank accounts, or personal property.
- C. Funeral home pre-planning.
- D. Gifts.
- E. Designated beneficiaries or "pay on death" designations.

4. Problems With Testamentary Transfer of Real Estate

Even if a gay or lesbian person executes a will, leaving his real property to his partner or lifelong friend, such testamentary transfer may be subject to a due on sale clause in the existing mortgage. However, if gay and lesbian people could marry and become “spouses,” then such acceleration would not occur.

A federal law (12 U.S.C. § 1701J-3) contains an exemption as to specified transfers which prohibit lenders from exercising a due on sale clause in the following circumstances:

(d) Exemption of specified transfers or dispositions

With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon—

- (1) the creation of a lien or other encumbrance subordinate to the lender’s security instrument, which does not relate to a transfer of rights of occupancy in the property;
- (2) the creation of a purchase money security interest for household appliances;
- (3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- (4) the granting of a leasehold interest of three years or less not containing an option to purchase;
- (5) **a transfer to a relative resulting from the death of a borrower;**
- (6) **a transfer where the spouse or children of the borrower become an owner of the property;**
- (7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse of the borrower becomes an owner of the property;
- (8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or
- (9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board. (Emphasis added).

This is just one example of how gay and lesbian people are discriminated against because they are prohibited from getting married.

XIII. A LOOK AHEAD

“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Lawrence v. Texas,
539 U.S. 558 (2003)

Even though the GLBT community has made tremendous advances in its fight for civil rights in a relatively short period of time, there are still at least four areas where future litigation is sure to occur:

1. Same-sex marriage (i.e., marriage equality);
2. Employment non-discrimination;
3. The military's "Don't Ask, Don't Tell Policy"; and
4. GLBT adoptions and birth certificate recordation.

Many lawyers do not realize that sexual orientation discrimination by a court or Judge is not permitted. Canon 3 of the Texas Code of Judicial Conduct states as follows:

Canon 3. Performing the Duties of Judicial Office Impartially and Diligently

B. Adjudicative Responsibilities.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in this proceeding.

The information set forth above in these materials is designed to provide some tools to equip current and future attorneys with the means of seeking justice and equality for all clients, including those that happen to identify as gay, lesbian, bi-sexual, or transgendered.