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Seven Tips for Dissolving Gay Unions

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In a previous post, we talked about the problems that same-sex couples may face if they decide to untie their various legal knots — whether they're married, part of a civil union or in a registered domestic partnership.

When a heterosexual married couple splits, they have access to divorce court and are entitled to the tax-free division of their property. With gay couples, that's not necessarily the case. Depending on where they live, they may not have access to divorce court. Even if they do, they may face higher costs because their unions aren't recognized by the federal government.

So we asked several experts on same-sex issues what gay couples need to think about before legally partnering, and what they'll probably need to consider should they decide to split:

Get it in writing. Even though prenuptial agreements or domestic-partner agreements can be contested and may not be enforceable in some states, they can be useful in outlining how assets should be divided in the event of a split, especially if a couple doesn't have access to divorce court. "Those documents often do clarify intentions and create enforceable obligations," said Jennifer Pizer, director of Lambda Legal's national marriage project.

You can also get creative, said Joyce Kauffman, a lawyer in Cambridge, Mass., with a same-sex clientele, and "put language in it that says if we are not able to divorce, wherever we live, we want this to be viewed as a binding contract and it can be enforced."

Children. Same-sex marriage, civil unions and comprehensive domestic partnership laws generally recognize children born into these relationships as the children of both parents. But the parent-child relationship can be contested in some states, which is why parents without biological ties to their children should adopt them (or move to a state where they can). So if a couple splits, the relationship between the nonbiological parent and child will be protected — as will the parents' obligations to the child — and any custody issues can be decided in a family court.

Dissolve all unions. All legal unions should be dissolved through the legal system whenever possible. If you don't (or can't), the states that respect same-sex marriage may continue to view your former spouse or partner as the next-of-kin, which means that person may have legal rights to make medical, financial and other important decisions if you become incapacitated.

"If a married gay man who can't get divorced in his home state is traveling in a state that recognizes him as still married, his estranged husband will have a full range of default legal rights," Ms. Pizer said. Some of those rights can be overridden with legal documents like medical and legal powers of attorney, but failing to sever your legal ties can also cause problems if you attempt to remarry or repartner.

Unwinding your union can be tricky. Some couples without access to traditional divorce court in their states have been able to get court judgments confirming they don't have a legal relationship, or any ongoing rights and responsibilities to each other, Ms. Pizer said, although it's hard to know how common this is because these court decisions are not generally published.

Moving back to the state that married you — or a state that allows gay divorces — is another possibility, however impractical. But one partner must generally live there for at least six months (and often a year) before the couple can get a divorce there. Even so, the divorce is unlikely to resolve any disputes about the division of property in another state.

California makes this a little easier: If you move out of the state, California can still dissolve your partnership. But it's unclear how much power the divorce courts in that state will have when it comes to dividing out-of-state assets.

Dividing assets. Heterosexual couples can divide their assets with few, if any, tax implications in a divorce. One spouse can sell property to the other without worrying about capital gains taxes, and they can transfer an unlimited amount of assets to each other without incurring gift taxes. (While all individuals can give up to $13,000 in cash and other assets to as many people as they desire, anything above that is considered a taxable gift; everyone has a $1 million lifetime exemption.)

But this is a big gray area for gay couples. The Internal Revenue Service hasn't issued any guidance for same-sex couples, but you can assume that it doesn't recognize gay marriage because of the Defense of Marriage Act, the federal law that bans same-sex marriage. That means that gay couples are not entitled to tax-free division of assets in a divorce (though they may not have to pay related state taxes if they live in a state that recognizes gay unions).

"It is safe to presume that most transfers of property upon divorce will be considered gifts for federal transfer tax purposes," said Steven J. Weissman, an estate planning lawyer

with Brady Klein & Weissman in New York.

So if a gay spouse wanted to transfer his share of the house to a spouse as part of a divorce agreement, any amount above $13,000 could well be considered a taxable gift. (Both spouses would need to file a gift tax return on amounts that exceeded $13,000, which would exhaust part of their lifetime exemption).

"And the sale of one same-sex spouse's appreciated property to the other, as commonly occurs in divorce, could result in a reportable capital gain," said Allen Drexel, a family lawyer in New York who works with same-sex couples. But the gay partner selling his share could use the $250,000 exclusion on capital gains, as long as it's a primary home; there are no exclusions for vacation homes or other property.

Still, the law isn't clearly defined, so couples, especially those with substantial assets, should decide how to handle these tax issues with legal counsel.

And if a gay couple without access to divorce court can't figure out a way to equitably split assets on their own, they may need to resort to other legal remedies. "For example, if you own property together and don't want to, you may be able to file a petition to partition or a similar action, which will result in a court order to sell the property," Ms. Kauffman said.

Retirement Plans. When heterosexuals divorce, they can also split qualified retirement plans like 401(k)s without triggering federal income taxes or penalties by using a "qualified domestic relations order," or QDRO. Individual retirement accounts can be transferred tax-free, too. But gay couples must withdraw the amount and pay all taxes and any penalties. That's why it pays to compensate a gay spouse with other assets, if you have them, before dipping into a retirement plan, said James Tissot, a financial planner in New York with a same-sex clientele.

Alimony. Typically, the person who pays spousal support can treat those payments as a tax deduction, while the recipient must report it as taxable income. But the I.R.S. hasn't issued any guidance here either, and the person paying spousal support may not be able to deduct these payments, and he or she could could incur a federal gift tax liability, Mr. Drexel said. "The jury is still out on this very important question," he added.