

Legal Briefs:

Avoiding Probate, Part I: Joint Tenancy

by Susan Murray and Beth Robinson

In a previous column we discussed the importance of having a valid Will. In this column and in next month's column, we will discuss alternatives to placing all of your property into a Will.

First of all, we want to emphasize that making a Will should be a fundamental, primary part of every gay person's preparation for the inevitable — our deaths. A Will allows you to control who will inherit your property, including real estate, savings, and personal possessions. If you are a single parent, a Will allows you to name the person you want to be the Guardian of your child upon your death. You can also appoint the person you want to supervise the distribution of your property. In addition, a Will allows you to specify your funeral/cremation wishes. Finally, a Will is a flexible document, since you can change it at any time until you die (assuming you are mentally competent to do so). Given all of its advantages, a Will should be a basic planning tool for most people.

Unfortunately, a Will also has one feature that some people consider to be a big disadvantage: when you die, your Will must be presented to the probate court (this is called "going through probate").

Before any of your property can be distributed to the beneficiaries you have named in your Will, the probate court must first decide whether you were competent at the time you signed your Will, and whether the document was witnessed properly. Assuming the court finds that the Will is valid, the court will then require the representative you have named in your Will to prepare a detailed list of your property, including its value. Then, if anything needs to be sold (to pay taxes or hospital or funeral bills, for example), your representative will have to get permission from the court to make any sale. The representative will also have to get permission to distribute your property to your beneficiaries. Finally, the representative will be required to file at least one accounting to show that your bills were paid and that the beneficiaries got the correct assets. It is not necessary to have a lawyer involved in the probating of your estate, but if there are substantial assets, the judge might suggest that a lawyer, and possibly an accountant, be hired.

Some people consider the involvement of the probate courts to be unnecessary, or unduly time-consuming and expensive. However, if you have any questions about whether your family will try to take property that you want your partner to have, the probate court's supervision can be an extremely helpful way to ensure that your wishes are followed.

The more property you have placed in your Will, the more complicated, expensive, and time-consuming the probate process will be. In Vermont, the probate courts are helpful and fairly efficient, and the process generally is relatively inexpensive. However, if you retire to another state before you die, the probate court system is likely to be much more cumbersome and substantially more expensive. The hassle and expense experienced by people in larger states such as Florida, California, and New York has caused people to try to devise estate plans which avoid probate.

One of the simplest ways to avoid probate is to put your property in joint names. Thus, you can add your lover's name to the deed to your house (make sure you call it a "joint tenancy with rights of survivorship" and not a "tenancy in common"). Once you become "joint tenants with rights of survivorship" on the deed, whichever of you lives longer will automatically inherit the house upon the first person's death, with no need to go through probate. You can also do this with savings and checking accounts, certain investment accounts, and stock shares.

There is one obvious advantage for gays and lesbians in creating joint tenancies. Since the property automatically passes to your "joint tenant" without passing through probate, naming your partner as a joint tenant will ensure that he or she will automatically inherit your home and savings. If you put this property in your Will instead, you might have to worry that your blood relatives will successfully challenge your Will.

However, there are some major disadvantages to creating a joint tenancy. First, if you put your partner on your real estate deed, you will be required to pay a property transfer tax, since the state of Vermont will consider the addition of your partner's name on the deed to be a "sale" of the property. It shouldn't surprise you that legally married couples can do this without having to incur this tax, since the legislature has created an exception for "spouses."

The second major disadvantage to creating a joint tenancy is that once you put your partner's name on your deed or on your bank account or stock shares, you cannot remove your partner's name without his or her permission. This is true even if all of the money in the account was deposited by you, and even if all of the money for the down payment on the house was contributed by you, and even if you were the only one who ever paid any of the mortgage or taxes or insurance or repairs.

Another disadvantage is that a joint tenant can sell his or her interest in the joint property at any time, to anyone. Further, a joint tenant has the right to withdraw any amount of money from a joint bank account at any time.

Since you can't "undo" a joint tenancy as easily as you can revise your Will, you should think very carefully about the ramifications before creating a joint tenancy to avoid probate. On balance, you may decide that you'd rather have the ability to retain exclusive control over your property during your entire lifetime. If that's the case, you should put your property into your Will, and allow the probate court to supervise the distribution of your property after death.

Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont whose practices include employment issues, family matters, estate planning, personal injury and worker's compensation cases, and general civil litigation. This column features timely information about legal issues of interest to our community. We hope to provide information about important laws and court cases that may affect our rights, as well as practical nuts and bolts advice for protecting ourselves and our families. If you'd like to see us cover a particular topic, please feel free to write OITM or call us at 388-6356. ▼

Chiltern Club's Vermont Chapter Underway

FAYSTON -- The Vermont chapter of the Chiltern Mountain Club will be meeting Sept. 21 in the Mad River Valley for a hike and then a potluck supper.

The Vermont chapter still is getting organized, so anyone interested in hiking and other outdoor activities is encouraged to attend either just for the hike, the potluck or both.

Meet at 2 p.m. for the hike at the home of Ross Sneyd in Fayston. That's near where the Sugarbush and Mad River Glen ski areas are. The potluck will be at 6:30. For directions or questions, contact Ross at 583-1299 or at RossSneyd@AOL.com.

For additional information on Chiltern, contact Bob Bland at 333-9448 or bland@sover.net. There also is a World Wide Web page for Chiltern at <http://www.chiltern.org.chiltern>. ▼

Mr. Upstate New York Leather Contest Planned

UTICA NY -- The Utica Tri's will host their seventh annual production of the Mr. New York Leather Contest during the weekend of October 19-20 at That Place, their home bar.

Frank Nowicki returns as Emcee; judges include reigning Mr. Upstate New York Larry Gazzilli and the current International Mr. Leather, Joe Gallagher. Winners of this year's contest will receive a prize package worth several thousand dollars, including entrance fees and a transportation/accommodation allowance for the Mr. Mid-Atlantic Contest to be held in Washington DC next January.

Contestants from New York and surrounding states, as well as nearby Canadian provinces, are eligible to enter.

Information on contestant eligibility, judging requirements, and contest fees may be obtained by writing the Utica Tri's at PO Box 425, Utica NY 13503-0425 or by e-mailing them at utrismc@aol.com. The deadline for registration is October 5, 1996. ▼

Saucy Jack

& the Space Vixens

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