ESTATE PLANNING AND PLANNED GIVING

for Lesbian, Gay, Bisexual and Transgender Individuals, Couples and their Families

Forward and Acknowledgements

The HOPE Fund was formed at the Community Foundation for Southeastern Michigan in 1994. Many caring community leaders have lent their time, talents and resources in making The HOPE Fund a success.

The HOPE Fund has secured gifts, grants and bequests of over $1 million as of the printing of this publication. We are deeply appreciative of the support The HOPE Fund has received. This support has enabled The HOPE Fund to make many meaningful investments in the infrastructure of organizations that make a difference in people's lives, improving health and increasing the understanding of the needs of gay and lesbian youth, teens and adults.

In 2000, the friends and family of George Fadiga – a founding volunteer of The HOPE Fund – established the George M. Fadiga Fund in his memory. Today this endowed fund supports charitable organizations and programs that serve the needs of gay, lesbian and bisexual persons, with preference given to activities that encourage individuals to contribute time and/or financial support. The George M. Fadiga Fund sponsors outreach events and activities in the area of estate planning for lesbian and gay persons. Thus, the George M. Fadiga Fund, a great complement to The HOPE Fund, is demonstrating the importance of estate planning for all individuals and their loved ones. This publication continues this important work.

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The purpose of this brochure is to describe affirmative steps that lesbian, gay, bisexual and transgender people ("LGBT" people) can take to accomplish their personal and financial goals while protecting their property, themselves and those they love from personal and financial hardship. These affirmative steps are the process known as "estate planning." Although estate planning is commonly understood to mean deciding how your assets should be divided after you die, the estate planning process is far broader. Estate planning includes planning for life's challenges, including some or all of the following:

- temporary or long term lifetime disability
- medical emergencies
- the efficient management of property during life and after death
- the protection of the mutual interests of couples in long term relationships
- preserving confidentiality
- minimizing taxes during life and at death
- in proper cases, leaving a legacy for the benefit of the community.

In other words, estate planning is about life as well as about death; it is about the "here and now" and not just about the hereafter; it is about your present and your future.

This brochure is based upon federal and Michigan law as of January, 2002. Changes to federal estate and gift tax law are scheduled through 2011. Please consult your professional advisers to determine how the law may apply to your circumstances.

What Do LGBT People Need to Know About Estate Planning?

LGBT individuals, couples and their families have particular incentive to plan their estates deliberately. Without enforceable, written planning in place, the personal and financial affairs of LGBT people are subject to legal "default" rules that were not designed with their needs in mind. The legal default rules favor relationships based upon marital or biological ties and do not recognize relationships that LGBT individuals may develop with unrelated loved ones and friends. Thus, the default rules may thwart the intentions of many LGBT individuals and couples. Estate planning remains important even for LGBT people whose closest relationships are with their biological family because deliberate estate planning guides and assists those who step into your shoes in the event of lifetime disability or death.

Through estate planning, LGBT people can address and resolve key issues affecting their personal and financial affairs:

- Who should help me manage my affairs in the event of short-term or long-term lifetime incapacity?
- Who should make medical decisions for me if I cannot speak for myself?
- What should happen to my property after I die?
- If I am in a relationship, how should my partner and I organize our financial affairs?
- How can I leave a legacy for my community?

You cannot "opt out" of estate planning. Whether you know it or not, you have an estate plan.

When you complete a beneficiary designation on your employer-provided life insurance, your retirement plan or your IRA, you are planning your estate.

When you add another person's name to your home or to your checking account, you are establishing who has (and does not have) rights in that account now and after you die.

When you ignore these matters and become disabled or die without a legally enforceable, written estate plan of your own, Michigan law "writes" your estate plan for you and decides who is in charge and who gets what.

What are the Legal Default Rules that Apply if I Don't Have a Written Estate Plan?

If you neglect to plan your estate, the default rules take over. What happens, for example, to the financial assets of an unmarried person who dies without a Will? Under Michigan law, the assets held in the sole and separate name of an unmarried person who has no written plan in place pass, through the public proceedings known as "probate," to the following persons, in the following order:

- descendants (that is, children or grandchildren) if any, and, if none
- parents, if living, and, if none
- the descendants of your parents (siblings, nieces, nephews and so on), if living, and, if none
- lineal descendants of maternal and paternal grandparents (that is, uncles, aunts and cousins), if living, and, if none
- the state of Michigan.

There also are default rules that establish who has priority to manage the financial affairs of a person who is disabled or who dies without having made express provision for these events. In the case of an unmarried person, priority is granted to the closest members of the person's biological family – to the exclusion of others the unmarried person might have preferred, such as a life partner, a trusted niece or a reliable friend. Indeed, the life partner of an unmarried person is not even entitled to notice regarding the distribution of the estate of an unmarried person who dies without a Will, let alone to any priority of appointment as Guardian or Personal Representative.

By developing and implementing a written estate plan that addresses lifetime and post-mortem matters, LGBT people can overcome any default rules. Through a carefully prepared estate plan, LGBT individuals can express their personal intentions in a complete and legally enforceable way.

What Documents Make Up a Complete Estate Plan?

Your estate plan is as individual as you are, and no two estate plans ever are identical. At the same time, most estate plans include at least the following fundamental "building blocks":

- Lifetime Planning
- a Durable Power of Attorney for Financial Matters
- a Durable Power of Attorney for Health Care
- in many cases, one or more Trust Agreements to provide for lifetime disability
- Planning for Your Death
- a Will
- proper beneficiary designations on life insurance, retirement plans and any other work-related benefit, and any IRA
- in many cases, one or more Trust Agreements.

Depending on the circumstances, other documents may be appropriate. LGBT couples should consider a lifetime domestic partnership agreement to address how property will be managed during life, or in the event of a breakup or a death. For individuals and couples who are charitably inclined, there are additional strategies, described more fully below, that can save income or estate taxes. The basic estate planning documents and their relevance to LGBT people are described below.

> ***"Through estate planning, LGBT people can address and resolve key issues affecting their personal and financial affairs."***

Planning for Lifetime Disability

"At a time when you may be vulnerable due to lifetime incapacity, your trusted agent can handle your financial affairs privately."

Durable Power of Attorney for Financial Matters

By a Durable Power of Attorney, you designate in writing an "attorney-in-fact" who can step into your shoes to handle day-to-day financial matters, particularly during a period of lifetime disability. The term "attorney-in-fact" refers not to a lawyer but rather to the person you name as your "agent" to act on your behalf. For example, your attorney-in-fact may sign your tax returns, may buy and sell property for you, and may pay your bills. You may limit the powers of your attorney-in-fact to a single transaction or generally may authorize your agent to do everything for you that you could do for yourself.

You are free to designate whomever you wish as your attorney-in-fact. For example, your attorney-in-fact can be your life partner, a trusted family member, a close friend, or a "team" including two or more trusted individuals. You can designate a primary attorney-in-fact and a backup. Your attorney-in-fact is required by law to act in your best interests, but you should choose only a trusted person who is capable of handling the tasks involved.

Your Durable Power of Attorney can be made effective immediately when signed, or it can "spring" into existence only in the event that one or more doctors certify that you have become incapacitated and are unable to make informed or reasonable decisions about your financial affairs. In any case, a Durable Power of Attorney ceases to be effective in the event of your death.

Why do LGBT people have particular need of a Durable Power of Attorney? At a time when you may be vulnerable due to lifetime incapacity, your trusted agent can handle your financial affairs privately and without unwelcome interference by family members, by other individuals or by a court. If you have designated an attorney-in-fact, there generally is no need for a court-supervised conservatorship to handle your affairs despite some lifetime incapacity. Unless you have signed a Durable Power of Attorney, biological family members with priority under the law may be authorized by a court to handle your financial matters whether or not you would prefer that they do so.

If biological family members initiate a contest in court about how your financial affairs should be managed during a period of lifetime incapacity, a Durable Power of Attorney may help cut short any dispute. Under your Durable Power of Attorney, you can designate who should serve as your court-appointed and court-supervised Guardian and/or as your Conservator in the event of need. A Guardian makes decisions related to the physical custody of an incapacitated person, and a Conservator handles financial matters for an incapacitated person. A court will consider your written designation of your choice of Guardian and Conservator, and your written designation generally supercedes the legal priority otherwise granted to biological family members.

Durable Power of Attorney for Health Care

Michigan law allows you to name a "patient advocate" who can make medical decisions in the event you cannot speak for yourself. In Michigan, you make this designation in a Durable Power of Attorney for Health Care, sometimes also called a "Medical Power of Attorney," a "Medical Directive" or a "Patient Advocate Designation." Other states have different terms for the document by which an individual can name a health care agent.

You may personalize your Durable Power of Attorney for Health Care by specifying the type of care you want–or do not want–particularly in the event of mortal illness or injury. For example, you can authorize your patient advocate to withhold or to withdraw life support; in the alternative, you can direct that all possible means of medical support be used to prolong your life. In either case, your patient advocate can act privately on your behalf during a difficult time.

If you have not signed a Medical Power of Attorney designating your patient advocate, medical care providers are likely to insist that someone become your court-appointed Guardian who can speak for you. Unless you have made other written designation, your closest biological family members will have legal priority over unrelated loved ones to seek appointment as your Guardian. The person declared by a court to be your Guardian not only has authority to speak for you but also can exclude from involvement in your care just those people you might have preferred to participate in life-and-death decisions.

A Medical Power of Attorney is different from the document popularly called a Living Will. A Living Will describes your intentions about the kind of care you would like to receive if you were mortally ill or injured. A Living Will does not name someone to speak for you, and it relies upon those involved in your care to follow your intentions. In many states, the directions expressed in a Living Will are legally enforceable, but there is no Michigan law that gives binding legal effect to Living Wills. Although a non-binding Living Will is preferable to no expression of your intentions, LGBT people who are Michigan residents should designate a patient advocate using a Michigan form of Durable Power of Attorney for Health Care if they have strong feelings in this regard.

Revocable Living Trust Agreement

A Revocable Living Trust Agreement can be a very efficient legal arrangement in the event of lifetime disability. With a Revocable Living Trust in place, the person you name can step into your shoes in the event of lifetime disability and can manage all property that you have transferred to your Trust. Before you become disabled, however, you retain full control of your trust property. Revocable Living Trusts are described in more detail below.

Joint Property: A Dream or a Nightmare?

Property owned jointly with rights of survivorship passes automatically to the surviving joint owner privately and without the need for probate. Should LGBT individuals who want beloved family members or friends to receive their assets upon death place those loved ones jointly in each asset?

In the proper case, joint property can work effectively for LGBT people. Consider the following:

> *Bill and Bob buy a home together and take ownership jointly with rights of survivorship. They contribute in equal measure to the purchase price, and they agree to share the expenses of maintenance equally. Over the years, they keep meticulous records of their respective contributions toward upkeep of, and improvements to, their home. When Bill dies, Bob becomes the sole owner of the home by operation of law without the need for any probate. If Bill's estate is exposed to federal or Michigan estate tax (described in more detail below), only Bill's one-half interest is included in his taxable estate. Under current law, the basis in Bill's one-half share of the home is adjusted to its fair market value on the date of Bill's death so that, if Bob later sells the home, Bob's capital gain may be minimized or even eliminated.*

Not all cases work so simply. Consider the nightmare that can arise:

> *Joyce and Susan find the house of their dreams. Joyce has a high-paying job, and she easily qualifies for a mortgage. Joyce provides the down payment for the home, and Joyce makes all of the mortgage payments. Susan has a lower-paying job than Joyce, but Susan periodically contributes what she can, as well as a great deal of*

personal labor for day-to-day maintenance. Susan and Joyce own their home as joint tenants with rights of survivorship because it is their intent that the survivor of them should be able to remain in the home. Neither Joyce nor Susan feel that they need a Will or a Trust because they regard the home as their primary asset, and they are convinced that the joint ownership accomplishes their intentions. Joyce dies without a Will, and her entire $2 million estate is transferred to Joyce's siblings– with the exception of the home, that passes automatically to Susan as surviving joint owner. As sole owner of the home, Susan must take over the mortgage payments, but she lacks the funds to do so. Worse, the IRS assumes that, because Joyce made the down payment and mortgage payments on the joint home, Joyce owned the entire home for estate tax purposes; no value is assigned to Susan's meaningful contributions unless Susan can produce records sufficient to overcome the presumption that Joyce paid for everything. Joyce's siblings, who are administering Joyce's estate, quite correctly demand that Susan contribute her pro rata share of the estate taxes attributable to the inclusion of the home in Joyce's taxable estate. Susan quickly must sell the home, pay her share of estate taxes and pay off the mortgage.

Although joint property worked like a charm in the straightforward example of Bill and Bob, it proved a nightmare in the case of Joyce and Susan. As a general rule, joint property operates efficiently when the dollars involved are relatively small and the facts are relatively simple; joint property can create considerable hardship when the amounts involved are significant and/or the personal situation is complicated.

Consider another example of joint property gone wrong:

Nathan, a single gay man, has invested successfully in the market. He expects that his $1 million securities account will be an important source of retirement income. If he were to die before exhausting the funds, however, he would like his siblings to divide the account. He hopes that his brothers and sisters will use their respective shares to pay for the college education of Nathan's nieces and nephews. Nathan's younger brother, Steve, is the most financially astute of his siblings, and Nathan makes Steve the joint owner of the account with the expectation that Steve will be sure the funds are divided and used as intended. As a designated joint owner of the account, Steve must be consulted whenever Nathan makes a trade (unless Steve separately authorizes Nathan to retain full investment control of the account). When Nathan dies, Steve becomes the sole owner of the account, to the exclusion of Nathan's other siblings. Steve has no legal obligation to divide the account or to supervise its use. If Steve honors the moral obligation to divide the account, Steve may be regarded as making taxable gifts to the siblings. Depending on the amounts involved, Steve's "gifts" may adversely affect his own tax and estate planning.

The problems associated with joint ownership often can be solved through the use of agreements, including Trust Agreements (described more fully below), partnership agreements, agreements governing the operation of joint tenancies, and other legal arrangements.

"As a general rule, joint property operates efficiently when the dollars involved are relatively small and the facts are relatively simple."

Planning for What Happens After You Die

What About My Funeral?

By your Will, you may authorize your Personal Representative to arrange your funeral in a particular manner. Your Will, however, may not be reviewed until well after the funeral is over. The preferred way to arrange for the kind of burial you want is to leave clear, written instructions with the persons who will be in charge.

Under Michigan law, your "next of kin" have priority to make all funeral arrangements, regardless of your expressed intentions. Your "next of kin" are your biological family and, by law, they can exclude other persons you might have preferred to make arrangements for you. In other words, there may be no foolproof way to overcome the legal authority your biological family has in this sensitive area.

If you have strong intentions about your funeral and burial, preplanning is the best option. For example, you can arrange a prepaid funeral. It may be at least as important to speak with your biological family about the arrangements you prefer, with the hope and expectation that they will feel morally bound to honor your intentions and to respect the interests of unrelated persons.

> *"If you have no Will, you are said to die 'intestate.' The biological family members of an unmarried decedent, as described above, inherit the probate assets of a person who dies intestate."*

Efficient Management of Your Property After You Die

Proper Beneficiary Designations

The largest financial assets of many individuals are benefits accumulated through employment. These benefits can include life insurance payable upon death, pensions, qualified retirement plans such as 401(k), 403(b) or HR-10 plans, and/or individual retirement accounts (IRAs). These benefits, if they remain when you die, generally are payable to one or more "beneficiaries" designated with the records of the employer or IRA custodian. If there is no written and enforceable beneficiary designation on file, the benefits generally are paid to your "estate" or to specified biological family members. Without a written designation on file, LGBT relationships will not be acknowledged or protected.

The failure to designate a beneficiary on a qualified retirement plan or an IRA not only may result in the transfer of that asset, by default, to your estate or to a close biological family member, but also may accelerate and increase the income tax on the distribution. When distributions are made from a qualified retirement plan or from an IRA, they are subject to ordinary income tax. If a proper beneficiary designation is on file, your designated beneficiary may take distributions over her or his remaining lifetime, deferring recognition of income until each distribution is made.

In view of the income tax imposed on individuals or estates that receive distributions from qualified retirement plans and IRAs, the charitably-inclined individual should consider giving these assets to one or more favorite charities because charities, as tax-exempt entities, can receive distributions without paying income tax on them. The use of qualified plans and IRAs for charitable giving is discussed in more detail below.

Wills

A Will is a document that directs how your "probate estate" should be distributed after you die. Your "probate estate" is property held in your sole name. For example, if you own your home in your sole name when you die, your home would be a probate asset, and your Will could direct who should receive the home or the net proceeds of sale of the home after your death. If you have no Will, you are said to die "intestate." The biological family members of an unmarried decedent, as described above, inherit the probate assets of a person who dies intestate.

By your Will, you can designate the "Personal Representative" who should administer your probate estate. You may designate any person or institution, like a bank or trust company. If you fail to nominate your Personal Representative, then members of your biological family will have priority for appointment under Michigan law.

What if you have no "probate" assets because all of your property is jointly held, passes by beneficiary designation or is titled in trust name? Do you still need a Will? It remains wise to have a Will for several reasons:

- A Will may include burial instructions that your Personal Representative is authorized to carry out (absent any opposition from your next of kin).
- A Will can direct how expenses and taxes are to be paid and who among your beneficiaries should bear the burden of those expenses and taxes.
- A Will disposes of assets that you may have forgotten were in your sole name or that you may acquire in the future in sole name. For example, an unanticipated inheritance from a long-lost relative, your winning lottery ticket in your dresser drawer, or any right of recovery under litigation pending at the time of your death may pass by your Will.

What is "Probate"? Should You and Can You Avoid It?

"Probate" proceedings are the legal steps prescribed by Michigan law for winding up the financial affairs of a deceased person. The tasks required to complete probate proceedings include collecting and valuing a deceased person's assets, paying outstanding debts and taxes, and transferring the person's assets to the survivors entitled to those assets under a Will, or, if there is no Will, under Michigan law. In Michigan, probate has become a fairly streamlined and simple process. In routine cases, probate is not supervised by a probate court.

Probate can have benefits. If all heirs and creditors receive notice of the probate and do not make timely claims against the estate, then heirs and creditors later can be barred forever from seeking to set aside your estate plan.

There nevertheless may be reasons to avoid probate, if possible. In order to begin and to end probate proceedings, paperwork must be filed with the local probate court. Any Will must be filed with the court. Documents on file with the court are part of the public record, and confidentiality is lost to the extent papers are filed. There are filing fees and costs related to probate.

For some LGBT people, there may be additional reasons to avoid probate. Close biological family members (your "heirs") must receive notice of the probate proceeding. Although the notice, by itself, does not give your legal heirs any rights, it may give them the incentive and the forum to intervene in your affairs. At the very least, notice to your heirs can be unsettling if your Will provides primarily or exclusively for unrelated persons or for charity.

Probate is required only for "probate" assets, as described above. If there are no probate assets, there is no need to "probate" your Will. Many people have no probate assets. For example, if an asset is held jointly, the surviving joint owner generally will take the entire asset without the need to probate the Will. Similarly, assets that pass by beneficiary designation, like life insurance, employee benefits or an IRA, do not require probate. Assets titled in the name of a Trust pass according to the terms of a Trust Agreement, as described more fully below, without the need for probate.

How Does a Revocable Living Trust Agreement Work?

The use of a Trust as a Will substitute has become common in Michigan because a Trust can offer distinct advantages over the use of a Will alone. The advantages are particularly useful to LGBT people.

What is a Trust? A Trust is an agreement that creates legally enforceable rights and duties. A Trust Agreement creates legal relationships between and among the following:

- a Settlor or Grantor who sets up the Trust
- a Trustee who administers the Trust, and
- one or more beneficiaries for whose benefit the Trust is administered according to the terms of a Trust Agreement.

Consider this example:

Nancy has considerable life insurance and employee benefits acquired through her employment. She also has used her savings to build a substantial securities account, and she added to her account a small inheritance that she received from her parents. Her life partner, Lisa, also has a fine job, but if something happened to Nancy, Lisa would have trouble maintaining their current lifestyle without Nancy's income. Nancy is very close to her godchildren, and, if something happened to her, Nancy would want to do something for them. Nancy consults a lawyer who advises her to set up a "Revocable Living Trust." Nancy is the initial Trustee, and she names Lisa as her backup, successor Trustee. As Settlor and Trustee, Nancy controls the Trust during her life. Nancy re-titles her securities account in the name of her Trust, and she makes the Trust the beneficiary of her life insurance and her employee benefits. In the event of Nancy's lifetime disability, Lisa steps into Nancy's shoes and manages Nancy's securities for Nancy's benefit. Nancy's Trust provides that, following her death, Lisa, as Trustee, should divide the Trust into two distinct shares:

- *One equal share is held in trust for Nancy's minor godchildren and used for their education or reinvested for their benefit. Outright distributions can be directed to a godchild, in stages: e.g., upon attaining ages 25, 30 and 25.*
- *One equal share is held in trust and available to Lisa for her support during Lisa's life. The Trustee can distribute Lisa's share to maintain the standard of living to which Nancy and Lisa were accustomed during their life together. Upon Lisa's later death, the Trust Agreement provides that any remaining portion of Lisa's share is added back to the godchildren's share.*

All of this planning can be carried out privately and efficiently through the use of Nancy's Trust Agreement. After Nancy's death, the Trustee can be Lisa alone, can be a bank or person other than Lisa, or can be a group of co-Trustees including Lisa and others.

This arrangement is often called a Revocable Living Trust. It is "living" because it is set up during life and often is funded with assets, such as securities, during your life. It is revocable because you, as Settlor, can amend the Trust Agreement at any time while you are alive and able; you even can revoke the Trust entirely and withdraw any assets placed in trust name.

What are the advantages of a Revocable Living Trust?

1. During your life, the Trust is invisible for most purposes. Third parties, like bankers and brokers, are accustomed to dealing with assets titled in the name of a Trust. For income tax purposes, all income from Trust assets is reported on your income tax return without the need for any separate tax return for the Trust itself.
2. In the event of lifetime incapacity, the Successor Trustee you have designated steps into your shoes and administers all of your Trust property privately for your benefit, without any court supervision and generally without interference by parties who have no interest in the Trust. For LGBT individuals, this privacy and confidentiality can make the incremental cost of establishing a Trust Agreement well worth the price.
3. In the event of death, assets held in trust name can be administered privately and confidentially, without probate and without notice to persons who are not beneficiaries of the Trust.

Revocable Living Trusts are not a cure for every ill. They do not avoid estate taxes, if such taxes apply. Assets held in a Revocable Living Trust are exposed to claims of your creditors because you own those assets for all practical purposes. For individuals who face tax concerns or who need creditor protection, additional steps may be taken, but those steps are beyond the scope of this brochure.

How the Estate and Gift Tax System Affects LGBT People

The United States and most of the fifty states, including Michigan, have a system of taxing transfers made to family and loved ones during life and at death. The federal estate and gift tax is entirely separate from the income tax system.

Federal and Michigan estate taxes affect a relatively small number of people because significant–and increasing–exemptions shelter the estates of most Americans from tax. For example, in 2002 and 2003, only individuals who own or control assets valued at $1 million or more are exposed to estate tax at death. To calculate the size of your estate, you need to add up the value of all property you own or control, including:

- real estate, such as your home and/or a vacation property
- stocks, bonds, and other financial assets
- cash and cash equivalents
- the net death benefit of insurance on your life or the value of life insurance that you own on the life of someone else
- your interest in property held jointly with someone else
- your tangible personal property and household effects
- your interest in any retirement plan, profit sharing plan or IRA
- significant gifts that you made to individuals during your life.

In June 2001, President Bush signed legislation that gradually is scheduled to eliminate our federal estate and gift tax system. The scheduled exemptions from tax and the scheduled reductions in the top marginal estate tax rates are set forth below:

Calendar year	The Exemptions from Estate Tax and Generation-Skipping Tax at Death are Increasing	The Highest Estate, Gift and Generation-Skipping Tax Rates are Declining
2002	$1 million	50%
2003	$1 million	49%
2004	$1.5 million	48%
2005	$1.5 million	47%
2006	$2 million	46%
2007	$2 million	45%
2008	$2 million	45%
2009	$3.5 million	45%
2010	Estate Tax and Generation-Skipping Transfer Tax Repealed	0% Estate and Generation-Skipping Tax; 35% Gift Tax (only on transfers over $1 million)
2011	Pre-2002 Law Returns Unless 2001 Law Re-enacted	55%

An unusual feature of the new law is that estate tax "repeal" lasts just one year. Repeal arrives in the year 2010 and it evaporates in the year 2011, when our current law returns unless Congress acts in the meantime. It is anticipated that Congress will act within the next several years to provide more certainty to the system. Some experts predict that the estate and gift tax system will be abolished completely and permanently. Other commentators anticipate that budget constraints and the political process will cause the exemption increase and rate reduction to be frozen indefinitely at one of the levels described above, such as an exemption of $2 million and a top rate of 45%. Of course, no one knows where the political process will lead.

It is worth noting that there is no particular death tax "penalty" associated with dying a resident of Michigan because the Michigan estate tax is simply a credit against the federal tax: If the credit dollars are not paid to Lansing, the same dollars are directed to Washington. The recent changes to the federal law have the result of eliminating the Michigan estate tax altogether by 2005.

To the extent federal estate tax applies, it remains at relatively high rates. For that reason, individuals whose estates are exposed to federal estate tax generally plan to minimize the death tax bite and attempt to maximize what they leave their beneficiaries. Married couples are able at least to defer all estate tax upon the death of the first spouse, but this "marital deduction" is not available to unmarried individuals or to LGBT couples.

If the estate of an LGBT individual is exposed to estate and gift tax, what options are available to reduce the tax bite? Federal estate tax is calculated on the value of all assets an individual owns or controls at the time of death. To reduce estate taxes, it is necessary to eliminate an asset from an individual's estate at death or to reduce the valuation of taxable assets. For LGBT people (as for their straight counterparts), effective tax reduction strategies include variations on the following:

- Arrangements to eliminate an asset from your taxable estate at death, such as an Irrevocable Life Insurance Trust.
- Arrangements to reduce the value, for estate and gift tax purposes, of transfers made to loved ones, such as limited liability companies, limited partnerships, and certain split-interest trusts.
- Arrangements that use the charitable deduction to reduce income and/or estate and gift tax, often with some accompanying benefit to loved ones.

An Irrevocable Life Insurance Trust ("ILIT")

Life insurance often is an appropriate asset to remove from the taxable estate because the insured generally will not receive any lifetime benefit from coverage that pays only upon death. An Irrevocable Life Insurance Trust can be created to eliminate the value of life insurance proceeds from the insured person's taxable estate. Consider this example:

Jane has been in a committed relationship with Rita for more than 15 years. Through her employment, Jane receives life insurance coverage that provides a death benefit of $2 million for her beneficiary. If Jane names Rita as the beneficiary of the life insurance proceeds, Rita would receive the insurance upon Jane's death without probate but subject to federal estate tax. Upon the recommendation of her lawyer, Jane instead creates an Irrevocable Life Insurance Trust and makes the ILIT the owner and beneficiary of the life insurance. If the Trust is structured and administered according to IRS rules, the net policy proceeds payable upon Jane's death can be distributed to, or held for the benefit of, Rita, free of all federal and Michigan estate tax. To operate as intended for estate tax purposes, the ILIT must be irrevocable, meaning that Jane cannot change the terms of the Trust Agreement after she sets it up. The Trust Agreement may provide, however, that if Jane and Rita are not living in a committed relationship at the time of Jane's death, the policy proceeds will be distributed to other beneficiaries.

Valuation Discounts May Apply to Reduce Estate and Gift Tax

Although an individual may be prepared to part irrevocably with ownership and control of life insurance coverage, the same person may not be in a position to give up control of property that is held for investment or for current income, like securities or real estate. Certain legal arrangements afford multiple benefits to LGBT individuals who have taxable estates. The benefits may include the following:

- Efficient management of assets during life and after death.
- Limitation of personal liability in cases where assets, such as an operating business or real estate, otherwise would expose the owner to the risk of personal liability.
- Valuation discounts for estate and gift tax purposes.

These strategies have particular application for individuals who own closely-held business interests, valuable real estate or collectibles, but they also apply to individuals whose high net worth comes from marketable securities or from collectibles. In such cases, the use of limited liability companies, limited partnerships and certain tax-favored trusts, such as qualified personal residence trusts or grantor retained annuity trusts, may afford benefits. Consider this example:

Calvin and Zack, through their combined and equal efforts, have assembled a valuable collection of American furniture and paintings. They want to be sure that, if something happened to one of them, the survivor retains control of their collection, including the power to acquire, use or sell objects. At the same time, each of them wants his 50% share of the collection to pass to his respective nieces and nephews after they both are gone. To reach these objectives, they place their collection in the C & Z Antiques Company, LLC. The term "LLC" stands for "limited liability company," and the LLC really is a separate entity from Calvin and Zack. The LLC can have a "manager" who runs the company. They serve together as manager for their joint lives, and the survivor serves as manager once one of them is gone. When Calvin and Zack both are gone, the assets of the LLC are liquidated and distributed in equal shares to their respective beneficiaries. At the death of just one of them, the deceased person's 50% interest is not worth 50% of the liquidation value because the company is not marketable, the LLC interests are illiquid, and the deceased person's beneficiaries lack control. The valuation discount attributable to these factors has the effect of reducing estate taxes.

Further discussion of these more advanced tax reduction strategies is beyond the scope of this brochure, but, in appropriate cases, individuals should consult experienced estate planning professionals to learn more.

The Charitable Deduction Can Reduce or Eliminate Estate and Gift Taxes

Amounts given to charity during life generally are eligible for a charitable income tax deduction and they escape gift tax during life. Amounts left to charity at death are fully deductible for estate tax purposes. Through a combination of the increasing exemption from estate and gift tax and the charitable deduction, an LGBT individual can reduce estate taxes to zero at death. Consider this example:

Andy's estate totals $1.3 million, consisting of the following: his home valued at $300,000; his employer-provided life insurance with a death benefit of $400,000; his investments valued at $300,000; and his IRA valued at $300,000. If Andy died in 2003 and left his entire estate to his life partner, Dan, federal and state estate taxes would total $124,000, leaving Dan with $1,176,000. If Andy's estate plan instead includes charity, the tax bite can be avoided, with relatively limited reduction in Dan's share. Andy could direct that the amount sheltered from estate tax should pass to Dan and that any amount in excess of such exemption *should pass to The HOPE Fund of the Community Foundation for Southeastern Michigan. Upon Andy's death in 2003, no federal or state estate tax is payable because $1 million passes to Dan and is sheltered from estate tax by the applicable $1 million exemption, and the balance passes to charity and is sheltered from estate tax by the charitable deduction. In this case, Andy would be well advised to direct his $300,000 IRA to charity because the charity is exempt from income tax whereas any amounts of the IRA paid to Dan will be depleted by income tax. Such planning provides $300,000 to charity and leaves Dan with only about $83,000 less than if charity were not included in the planning.*

Additional charitable giving strategies that may be useful to may LGBT people are discussed below. High net worth individuals who wish to establish and to control their own charitable foundations or supporting organizations, however, should consult experts in charitable giving because such advanced strategies are beyond the scope of this brochure.

Planned Charitable Giving: How You Can Do Well by Doing Good

Charitable giving is encouraged through tax benefits, but all methods of charitable giving are not equal under current income, estate and gift tax laws. Some methods are more "tax-efficient" than others in that they produce an income tax deduction at a reduced personal cost. Certain charitable giving devices allow donors to preserve cash flow for themselves and their loved ones during life, deferring the charitable gift but recognizing an immediate income tax or estate tax benefit. For LGBT couples who are denied the benefit of the federal estate tax marital deduction, certain deferred charitable giving techniques afford some estate tax relief.

Planned charitable giving is a broad and complex area, and LGBT individuals or couples with charitable intentions should seek expert assistance. The burdens and benefits of several methods that may be interest to LGBT people are discussed below.

Outright Charitable Gifts

Outright gifts of cash or of marketable securities are generally simple to accomplish and are gratefully received and put to use by charitable organizations. The donor who itemizes income tax deductions is entitled to a federal income tax deduction in the amount of the cash contributed or of the fair market value of the stock on the date of the transfer so that, in effect, the IRS pays a portion of the gift. For individuals who do not itemize, there currently is no federal tax relief for the gift. Regardless of whether you itemize deductions for federal income tax purposes, there is a Michigan income tax credit for contributions to certain Michigan charities, including the HOPE Fund endowment or another endowed fund at the Community Foundation for Southeastern Michigan.

For an individual who holds appreciated securities, it generally is less "tax-efficient" to give cash than to donate the securities. When giving cash, you are using "after-tax" dollars (that is, money on which you already have paid income tax). When you give appreciated stock, you avoid recognizing income tax on the built-in gain on the property. Compare theses examples:

Maureen owns appreciated marketable securities that she bought for $2,000 and that now are worth $10,000. If she sells the securities in 2002 and donates the net proceeds to charity, these income tax results follow:

- *She recognizes gain of $8,000, and she owes capital gains tax at a 20% rate*
- *The IRS takes capital gains tax of $1,600*
- *The charity receives the net remaining of $8,400*
- *Maureen gets an income tax deduction for a cash gift of $8,400.*

If Maureen instead gave the charity her appreciated, marketable securities:

- *The charity receives $10,000. The charity can sell the securities, and any income tax on the built-in gain is avoided forever because the charity is a tax-exempt entity*
- *Maureen is entitled to a $10,000 federal income tax deduction*
- *The built-in gain escapes income tax, and the IRS gets nothing from the transaction.*

The lessons derived from the example are clear:

- If you are in a position to do so, give appreciated, marketable securities that you have held for more than a year instead of cash.
- Do *not* sell appreciated securities for your own account and then give the net proceeds to charity because such a sale and net gift is not tax-efficient.

Donors in a position to make a larger outright gift (e.g., a gift of $10,000 or more) to charity in a single year may be interested in creating a Donor Advised Fund at the Community Foundation for Southeastern Michigan. Consider this example:

Dan is taking a favorable severance package from his current employer. Due to the severance, Dan will have "bunching" of income in the year of his severance, and he could use a larger income tax deduction than normal to offset his income. He would like to help his favorite charities, but he believes that his gifts would be more useful if made over a period of years rather than all at once. By establishing a Donor Advised Fund at the Community Foundation for Southeastern Michigan, Dan can lock in his income tax deduction this year but defer distributing sums to his favorite charities until later years.

A Donor Advised Fund works this way. You make an outright gift of cash or securities to the Community Foundation and are entitled to an immediate income tax deduction equal to the fair market value of the property contributed. The Foundation holds and reinvests your gift in a tax-free fund under your name. In future years, you can advise the Community Foundation about gifts that you would like to be made from the fund. Although the Community Foundation Trustees have the final say about what gifts are made, your requests for gifts to public charities wherein you receive no personal benefit are respected. The Community Foundation has been particularly sensitive to the needs of LGBT organizations, but it supports charitable activities throughout southeast Michigan and throughout the country.

Deferred Charitable Gifts

Individuals and couples with charitable intentions may not be in a position to make an outright gift because they need current cash flow from their assets. There are ways to make deferred charitable gifts that permit the donor to lock in the following benefits:

- Assure you (and/or a partner, friend or family member) a present and future cash flow
- Reduce your current income tax bill
- Diversify your assets without incurring immediate capital gain on sale
- Reduce or avoid estate and gift taxes.

Deferred charitable giving methods that share these characteristics include pooled income funds, Charitable Remainder Trusts, and charitable gift annuities. Consider this example:

Sarah works for a publicly-traded automotive supplier, and she has accumulated substantial employer securities over the years. Her income tax basis in the securities is low. Her life partner, Karen, works for a social services agency that is not able to provide Karen with a good salary now or with significant retirement benefits.

Sarah is concerned about Karen's welfare in the event Sarah predeceases her partner, because Karen does not have retirement savings and because Karen is not a legal spouse who will qualify for Sarah's pension benefits. Sarah and Karen are very supportive of local LGBT organizations, and they would like to do more for charity provided they retained enough resources for their own retirement. Their lawyer, accountant and financial planner suggest that a Charitable Remainder Trust may be a way to meet their objectives of providing current and retirement income for themselves for life, while still making a meaningful deferred gift to charity. Sarah transfers some of her low-basis securities to a Charitable Remainder Trust that operates as follows:

- *Sarah retains the right to cash flow from the Trust for Karen's and her combined lives. The retained cash flow can be in one of two basic forms (with variations). They can retain a fixed annuity (that is, an unchanging dollar amount established at the outset and never changing), or they can retain a "unitrust" interest (that is, a percentage of the Trust, as revalued each year, so that the amount they retain may go up or may go down depending on the growth or decline in the value of the Trust).*
- *After Sarah and Karen both die, the remainder in the trust goes to charity.*
- *When she transfers securities to the Trust, Sarah secures an immediate income tax deduction. The income tax deduction is the present value, discounted using IRS tables, of the projected charitable remainder after Karen and she are both gone. The size of the immediate charitable income tax deduction depends on several variables: (i) how long the charity is expected to wait to get its remainder, which, in turn, depends on Sarah's and Karen's ages; and (ii) the projected value of Sarah's and Karen's interest, which is calculated using an IRS rate that is published monthly. The larger the annuity or unitrust interest that Sarah and Karen retain, the smaller the immediate charitable income tax deduction, and vice-versa.*
- *The Charitable Remainder Trust can sell Sarah's securities without incurring any immediate capital gains tax on the sale. Thus, the entire amount that Sarah transfers to the Trust continues to work for the couple. Indeed, the cash flow from the Charitable Remainder Trust is likely to be higher than the current dividend yield on Sarah's securities.*
- *The cash flow from the Charitable Remainder Trust is taxed in a favorable manner:*
  - *The first dollars distributed are taxed as ordinary income, to the extent of the Trust's current or accumulated ordinary income, such as interest and dividends.*
  - *The next dollars distributed are taxed as capital gains, to the extent of the Trust's current or accumulated capital gains.*
  - *The next dollars distributed are tax-exempt income, to the extent of the Trust's tax-exempt income.*
  - *The last dollars out are return of Trust principal (and, thus, are not subject to income tax).*
- *When she sets up the Charitable Remainder Trust, Sarah makes a gift to Karen. Unless the value of the gift exceeds Sarah's $1 million lifetime gift tax exemption, no gift tax is payable when the gift is made. At death, Sarah's estate gets an estate tax deduction for the value of the charitable remainder.*

"There are ways to make deferred charitable gifts that:

- ***Assure you a present and future cash flow***
- ***Reduce your current income tax***
- ***Diversify your assets***
- ***Reduce estate and gift taxes."***

In a case like that of Sarah and Karen, a Charitable Remainder Trust can be a "win-win" situation for the couple and for charity. At the same time, a Charitable Remainder Trust should not be entered into without careful thought and planning because, once set up, the Trust cannot be revoked. Although the donor can retain some flexibility (such as the right to revoke the interest of a successor beneficiary and the right to change the identity of any beneficiary of the charitable remainder), the donor cannot get the transferred property back except to the extent of the annuity or unitrust interest. In other words, individuals contemplating such a deferred charitable gift should secure expert assistance to be certain they will achieve the desired benefits. The irrevocability and complexity of Charitable Remainder Trusts add to the cost of establishing the arrangements, and such Trusts are most appropriate when significant gifts are contemplated.

There are less costly alternatives that afford some of the same benefits. A donor can consider a pooled income fund or a charitable gift annuity. Pooled income funds are established by charities (like the Community Foundation for Southeastern Michigan). The charity gratefully accepts your gift (often, appreciated securities), and pays you (and/or your designated loved one) each year your pro rata share of the ordinary income earned by the pooled income fund. You get an immediate income tax deduction calculated in much the same manner as it would be for a Charitable Remainder Trust. You also avert immediate capital gains tax on the sale of appreciated securities that you held for more than a year prior to your contribution to the fund. At your death, the remainder goes to charity.

A charitable gift annuity is a "part sale, part gift" transaction. You purchase an annuity from a charity. The price of the annuity includes a gift to charity, and entitles you to an immediate income tax deduction for the value of the gift. You receive (or a person you name receives) an annuity for life. The annuity can start immediately or can be deferred. The rate of return on the annuity is usually based on a table of recommended rates established by a national organization with reference to the age of the annuitant and historic market performance.

Deferred charitable gifts share the common features of allowing donors to receive immediate and future income, estate and gift tax benefits while retaining cash flow from their assets. The Community Foundation for Southeastern Michigan can supply further technical information about deferred charitable giving to donors who have an interest in this area.

Using Qualified Retirement Plans and IRAs for Charitable Giving

Many working people accumulate their greatest savings in tax-deferred, qualified retirement plans or IRAs. When amounts are distributed from these plans upon retirement or to beneficiaries after the death of the plan or account owner, every dollar is taxed as ordinary income at whatever ordinary income tax rate applies. Upon the death of a plan or account owner, the funds also are exposed to estate tax. Although married couples can defer the death tax liability, LGBT couples are not afforded the same benefit.

"An LGBT individual may achieve tax savings for loved ones while supporting charity."

Qualified plans and IRAs make excellent vehicles for charitable giving. If you designate a charity as the outright beneficiary of whatever remains at your death in your retirement plan or IRA, the charity can receive the entire amount without reduction for income tax or estate tax. The loss to your loved ones of the retirement funds passing to charity is mitigated by the fact that, had the funds passed to individuals, they would have received the net amount after income tax and, if applicable, estate tax.

By combining the use of a Charitable Remainder Trust with a gift of retirement funds, an LGBT individual may achieve significant tax deferral and savings for loved ones and make a meaningful gift to charity. Consider this example:

Lou has an estate of $1.3 million. The estate is made up of cash and securities of $450,000, a home worth $350,000, life insurance of $200,000 and a qualified retirement plan worth $300,000. He wants to do something for charity, but he is concerned that his partner, Jerry, aged 65, will have cash flow during Jerry's remaining 20-year life expectancy.

What if Lou dies in 2002, leaving everything to Jerry? The results would be as follows:

- *Estate taxes and expenses are projected at about $131,400.*
- *If Lou's retirement plan, after federal estate taxes, were paid through Lou's estate outright to Jerry, ordinary income tax of about $53,000 would be due, assuming Jerry were taxed at a 27% income tax rate. (Note, however, that by making Jerry the designated beneficiary of Lou's retirement plan, Jerry could receive the retirement plan over Jerry's projected life expectancy, deferring the immediate income tax impact. If necessary, Jerry still could withdraw all or any portion of the entire remaining retirement plan at any time.)*
- *After estate taxes, income taxes and expenses, Jerry would receive about $1.1 million of the initial $1.3 million estate.*
- *Charity would receive nothing (unless Jerry later decided to leave something to charity).*

How would the results change if Lou instead left everything outright to Jerry except for the retirement plan, which instead was directed to a Charitable Remainder Trust for Jerry for life? The Charitable Remainder Trust is structured to pay 5% of the Trust, revalued each year, to Jerry for life, with the remainder passing to The HOPE Fund upon Jerry's death. The results would be as follows:

- *Estate taxes are estimated at about $60,000–about half of the amount payable if no charitable gift were involved–because Lou's estate receives a charitable estate tax deduction of over $140,000 due to the Charitable Remainder Trust gift.*
- *After estate taxes and expenses, Jerry can expect to receive over $925,000 outright.*
- *Jerry receives 5% of the Charitable Remainder Trust, holding the retirement plan for his life. If Jerry survives 20 years, and if the Charitable Remainder Trust grows by an average of 8% over that time, Jerry is projected to receive, before ordinary income tax, over $403,000 over his lifetime.*
- *Through a combination of the outright gift of $925,000 and the unitrust payments of $403,000, Jerry arguably fares better with the charitable planning for Lou's retirement plan than he would if everything passed outright to him.*
- *If the Trust grows at an average of 8% per year, then upon Jerry's later death, charity will receive the trust remainder, projected at just over $526,000.*

Where to Go from Here: Some Practical Questions and Answers

"In summary, it is prudent to secure the assistance of a lawyer to draft a legally enforceable estate plan."

What About Do-It-Yourself Estate Planning?

Forms of estate planning documents described in this brochure are available to the public in legal stationery stores, in legal forms books at public libraries and at certain Web sites. For example, a form of Designation of Patient Advocate that complies with Michigan law is available to the public. The form has been prepared in cooperation with the State Bar of Michigan, the Michigan Association of Osteopathic Physicians and Surgeons Inc., the Michigan Hospital Association, and the Michigan State Medical Society. It is generally self-explanatory, but if you have any questions about the form it would be best to consult a professional before completing the form. The form is not useful unless and until your patient advocate also has signed it, and your doctor cannot rely on the form unless and until the doctor has a copy. To make sure the form operates as intended, you need both to complete the form properly and to deliver it to your patient advocate and to your doctor. A professional adviser can supply critical guidance with these essential details.

Michigan also has a form of Statutory Will: that is, there is a "fill-in-the-blank" form of Will approved by Michigan law and available to the public through the State Bar or through legal stationery stores. Unfortunately, Wayne County Probate Court personnel report that an estimated 50% of such Statutory Wills fail because they are not completed properly. As noted above, the absence of an effective estate plan subjects the estate of an LGBT individual to legal default rules that were not designed with the needs of LGBT people in mind.

By reviewing available forms and reading about estate planning, an individual may become a more educated consumer of estate planning services. The educated consumer should learn to recognize when a professional is needed. If any tax advice is appropriate, knowledgeable assistance is critical. Similarly, if family relations are strained or if provision is to be made for persons other than legal heirs, experienced help in preparing your plan can save time, money and hardship later.

In summary, it is prudent to secure the assistance of a lawyer to draft a legally enforceable estate plan. Under current Michigan law, lawyers are the only professionals authorized to draft estate planning documents like Wills and Trust Agreements. Other financial planning professionals, however, can make valuable contributions to the estate planning process. Accountants offer important tax planning advice, and investment advisers, including certified financial planners or brokers, can suggest ways to achieve financial security. Indeed, you may be well served by a team of professionals. Generally one of these professionals will take the lead and will coordinate the services you need to do a complete job with your estate planning.

How Do I Find the Help I Need?

How should you select your professionals? Referrals from people you know and trust are the best place to start. If you do not have a source for referrals, you may check advertisements in directories and may attend seminars to develop an understanding of the issues, your options, and some solutions.

How do you know if your lawyer knows what she or he is doing? Michigan does not certify lawyers as estate planning specialists. Before engaging a lawyer, you should try to determine the level of professional expertise the lawyer may have. You should feel free to inquire about the following:

- How long has the lawyer been in practice and how many estate plans has the lawyer done during that time?
- What continuing professional education does the lawyer secure?
- Is the lawyer familiar with the legal needs of LGBT people, and is the lawyer comfortable working to address those needs?
- How do you relate to the lawyer?
- What systems does the lawyer have in place to protect your confidentiality?

How Much Does Estate Planning Cost?

The cost of estate planning will vary with your needs and will depend upon the professional assistance you secure. Some individuals require only a Durable Power of Attorney for Financial Matters, a Durable Power of Attorney for Health Care, and a straightforward Will. The preparation of these documents generally costs about the same as a discounted airline ticket for a domestic trip. Even individuals requiring estate tax planning advice and one or more Trust Agreements generally can get their fundamental planning completed for about the same price as a new computer system or the cost of an out-of-town vacation.

It is prudent to inquire about pricing and even to ask your advisers to put their fixed or estimated fees in writing. Estate planning is a service, and there is no harm is seeking a competitive price.

Where Can I Learn More?

Useful resources about estate planning for LGBT individuals include, without limitation, the following:

Lambda Legal Defense and Education Fund
www.lambdalegal.org
120 Wall Street, Suite 1500
New York, NY 1005-3904

> *"Life Planning: Legal Documents and Protections for Lesbians and Gay Men"* can be downloaded from the Web site.

National Center for Lesbian Rights
www.nclrights.org
870 Market Street
San Francisco, CA 94102

> *"Partnership Protection Documents, a Sampler of Forms"* can be downloaded from the Web site.

The American Civil Liberties Union publishes a handbook, *"The Rights of Lesbians and Gay Men."* The third edition was issued in 1995 by the Southern Illinois University Press.

With respect to charitable giving or The HOPE Fund, contact the **Community Foundation for Southeastern Michigan** at *www.cfsem.org* or 313-961-6675.

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