

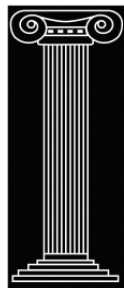
Estate Planning for LGBT Couples:

Why is it Important?

Protect Yourself and Your Loved Ones

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Why is it Important? Protect Yourself and Your Loved Ones



Equality

Equality is something everyone wants and expects. Often though, equality is not an option for everyone. Lesbian and gay couples face discrimination at work, at school and in social settings. Their sexuality plays a role in how they are treated every day – by employers, family members, friends and even strangers. But it's how they are treated after one Partner dies that may be even more unsettling.

When it comes to establishing rights to a loved one's estate, there isn't much in the way of legal precedent to support claims of unmarried partners. The Courts are bound by the law and not by an assertion of love by a surviving Partner. Since gay or lesbian marriages are not legally recognized throughout most of the country, special estate planning measures must be implemented to ensure that each Partner's assets are distributed according to his or her wishes.

Due to the federal estate tax unlimited marital deduction, property can pass tax-free from a deceased spouse to the surviving spouse. Under many states' laws, when a married spouse dies without a Will or Trust, a significant portion of the deceased spouse's property passes to the surviving spouse – often as much as half of the deceased spouse's property with the balance passing to the children of the marriage, if any.

Lesbian and gay couples do not have this built-in step that enables them to automatically pass along assets between Partners at death. If no estate planning has been implemented, the individual's assets will be divided among his or her family members. This is true even if they have lost touch with each other. So as you can see, these are some key differences.

But without this understanding and without an immediate need to plan one's estate, most lesbian and gay couples fail to do the additional planning necessary to make sure their estates are settled according to their wishes and not what the law of the land would otherwise dictate.

Avoiding Living Probate

Unless you've made plans ahead of time, a devastating injury or illness can throw you squarely in the middle of a potential legal nightmare called Living Probate, also known as a Guardianship proceeding. That's when a Court determines whether you should be declared legally incompetent, and if so, who should be placed in charge of your personal and financial care.

At a time like this, most of us would want our Partner to oversee our care. Who else knows our wishes and fears as well, and is in the best position to speak for us when we cannot? But without a plan in effect ahead of time, other relatives – most often a parent – will most likely have a greater legal right to that role. The Court may also appoint a professional guardian – quite possibly a total stranger. In either case, your Partner could be shut out of your affairs and forced to watch from the sidelines as others make critical decisions regarding your care.

Inheritance

When it comes to inheritance, once again the law weighs in on the side of tradition. If you have not acted, the law will ignore the personal commitments you've made. Unless you've left behind other instructions, at death your Estate will go to those individuals whom the State decides are your legal heirs. That could, for instance, mean that all your worldly goods pass to a Parent, or other relatives, you haven't spoken to in 20 years. On the other hand, your Partner of the last two decades would be left out in the cold.

The kindest thing you could do for those you love is to clearly set out your wishes in writing well ahead of time. It's the best way to ensure that your loved ones – all of them – receive what you want them to from your Estate. It's also the best way to minimize expenses and death taxes as well as control how and when your Estate is distributed.

Privacy

Here's one last reason why estate planning should be high on your list of priorities. Most of us would prefer to keep our private affairs just that – private. And that's as true in death as in life. It's nobody's business whom we love, how much we owe and to whom, and what we've left behind. Yet, all those details – and much more – could easily become the fodder for gossips and snoops if you don't plan your Estate properly.

If you die without any estate plan at all, or if you use a Will to dispose of your property, your estate will go through probate. This legal proceeding is a public process and frequently can be time-consuming and costly. It can also be bureaucratic and annoying. Most people want to spare their loved ones this arduous experience.

Using a Revocable Living Trust, "RLT," keeps you in control. You should be the trustee during your lifetime and then appoint a successor trustee to take over after you're gone. You can designate how and when your heirs receive your estate assets.

Through the use of a RLT, you avoid probate. Upon your death, quietly and discreetly, your property will be distributed to whom you want, in the way you want, when you want. Your private affairs remain that way. A RLT also helps you avoid guardianship proceedings. You designate the person of your choice to manage your financial affairs and personal care should you become disabled.

Planning Ahead

Upon death, the absence of planning inevitably results in some complications, delays and expense. Most of which can be avoided. This is true regardless of one's marital situation. However, the obstacles for lesbian and gay couples who fail to plan are often insurmountable. If an individual dies without a Will, the law of intestacy determines the distribution of his or her assets. Each state determines the order of distribution, but generally, the assets will go to the decedent's legal spouse and children first, and then to other blood relatives. This means that a life Partner will not be given the deceased Partner's assets under the laws of intestacy. So what can be done to assure that a Partner is not left out, and that one's wishes are respected? The key is to plan for all situations, and plan early.

Although lesbian and gay couples are not afforded the same estate tax benefits as married couples (the Unlimited Marital Deduction), they can use a RLT to ensure that a Partner is provided for after the first Partner's death. The RLT provides a means to direct the disposition of assets, while avoiding costly probate procedures. Lengthy court proceedings can also be avoided should one party become incapacitated.

In addition to a Trust, Wills for each Partner offer lesbian and gay couples additional security. In an overall estate plan, the Will can be drafted to “pour-over” assets that may have been left out of your RLT, into it. However, in order to be transferred into your Estate after your death, these assets will go through probate to get into your Trust. In this way, the directions expressed in the Trust can govern all assets upon death.

Funeral Arrangements

Another dilemma facing lesbian and gay couples is in your personal funeral arrangements. Without written directions, family members who are unfamiliar with or intolerable of the relationship may make arrangements contrary to the couple’s wishes. A Letter of Memorandum stating the directions for funeral arrangements can resolve this issue by clearly expressing the couple’s desires.

Alternative Families with Children

With the growing prevalence of lesbian and gay couples, comes the introduction of alternative families with children. When one or both Partners have minor children, and if there is no other natural parent alive, it is imperative that the parent’s wishes for the care of his or her child be legally expressed. In the absence of parental guidance, there is a risk of allowing the Court to decide the placement of minor children, possibly contrary to the parent’s wishes. This can be the case where a Court is not “friendly” to the surviving partner’s lifestyle. Naming a guardian for minor children in a Will may help to avoid this stressful and costly process. Also, even when a natural parent survives and retains custody of the minor child, one can still name the surviving Partner as guardian of the child’s estate. This means that even if the Court does not allow the Partner to be the guardian of the child, he or she can control the finances left to the child by the decedent.

Health Care

Lesbian and gay couples also face the risk of being denied visitation of a Partner in the hospital. When one party is unable to communicate their healthcare preferences, it is likely that a blood relative will be asked to comment on the patient’s wishes, instead of a domestic partner. The use of advance medical directives can solve this problem. A Healthcare Power of Attorney, “HCPOA”, Health Care Representative Appointment, “HCRA”, and a Living Will can avoid these impediments. Should one become unable to make his or her wishes known, the Living Will gives clear directions for the limits to be placed on medical treatment, and the HCPOA/HCRA nominates the Partner, as an agent, to act on the other’s behalf in healthcare matters. These documents can also express a desire that a Partner be permitted access to the other Partner’s hospital room. It is important to make these documents available to physicians for placement in medical records, and when it becomes necessary, deposit copies with the nurse’s station, so that wishes are not overlooked.

Life Insurance

The purchase of life insurance can also prove to be a difficult task for lesbian and gay couples. In order for one party to own insurance on another’s life, the policy owner must generally have an insurable interest in the insured’s life. This is based upon state law, and generally requires a familial or economic/business relationship. Therefore, as lesbian and gay marriages are widely unrecognized, insurance companies may deny issuing a policy when one attempts to purchase life insurance on their Partner’s life.

However, the Irrevocable Life Insurance Trust, “ILIT”, can overcome this obstacle. By creating an ILIT to serve as the policy owner, and having a Partner as the Trust beneficiary, the “insurable interest” problem faced by lesbian and gay couples is avoided. Even if a particular insurance company allows the transfer of an existing policy to a partner, this transfer would trigger gift tax since lesbian and gay couples cannot avail themselves of the unlimited gift tax marital deduction.

An ILIT, however, may prevent the realization of gift tax if drafted properly. Additionally, the ILIT provides a means to remove the policy from the owner's estate, and can be used for wealth replacement if some assets are lost to estate taxes at the insured partner's death. An ILIT can also provide protection from creditors of the beneficiary of the ILIT, and can prevent the proceeds from being included in the beneficiary's estate if drafted appropriately. Although the ILIT is irrevocable, it can be drafted so that if the relationship should terminate, the estranged partner is not entitled to the policy proceeds.

Domestic Partnerships

A somewhat new vehicle available to lesbian and gay couples is the Declaration of Domestic Partnership. Some municipalities, such as California, now formally recognize domestic partnerships. Private employers are also using such declarations as a form of registry to extend benefits to non-traditional couples which have historically only been offered to traditional couples. This may include such benefits as sick leave to care for a domestic partner, and health care coverage for domestic partners of employees. However, registration often is not confidential, and joint financial responsibility may result from a Declaration. Therefore, it is imperative that the form be read thoroughly before being signed and submitted. Declaration forms are generally available directly from the recognizing entity.

Lesbian and gay couples face many obstacles in planning for the future. However, with the help of a qualified estate planning attorney, couples facing these challenges can overcome many of the hurdles. Effective estate planning alleviates stress and frustration and helps to ensure your wishes are met – no matter what your lifestyle.

For more information, call (608) 273-0820.



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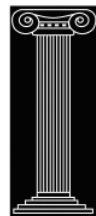
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