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## GAY & LESBIAN COUPLES

*Face Special Challenges In Estate Planning*



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## ABOUT THE FIRM

**Wood Legal Group, LLP** provides quality, personalized estate planning for our clients. Whether you need an attorney for Estate Planning, Trust administration, Probate litigation or a Certified Financial Planning Professional, our team of qualified individuals and referral partners, are here to help you and your loved ones.

In these turbulent times, if you or your loved ones would like a 15- minute complimentary exploration call to discuss your estate plan and financial strategy, visit our website at [www.woodlegalgroup.com](http://www.woodlegalgroup.com), or call us today at **626-898-9195** to schedule an appointment. We present webinars on a variety of estate planning and elder law topics; email us if you want to be on our mailing list.

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## LGBT Estate Planning and marriage equality

The last thirty years have seen breathtaking changes on the way to marriage equality. For decades, attorneys have stressed that lack of marriage equality meant that LGBT couples had an especially critical need for an estate plan. Now that same-sex marriage is legal nationwide, you need an estate plan just as much, if not more.

In this report, we'll review some of the legal milestones since 1986; address seven common concerns of LGBT couples; and talk about why you need a plan whether you're married or not. We'll also take a look at the characteristics of a solid estate plan and give you some pointers on selecting an estate planning attorney who can meet your needs.

### The ROAD TO EQUALITY

Thirty years ago, the legal landscape was bleak for same-sex couples. Marriage was impossible, and in some states, same-sex relationships were criminalized.

In 1986, the US Supreme Court ruled in *Bowers v. Hardwick* that the Constitution allows states to make consensual same-sex relations illegal.

Eleven years later, Congress passed the Defense of Marriage Act (DOMA). This law, which applied only to the federal government, defined marriage as the union of one man and one woman. Under DOMA, same-sex couples were not recognized as spouses under federal law, and were not eligible for federal benefits available to heterosexual married couples.

Things began to change in 2003. Seventeen years after *Bowers v. Hardwick*, the US Supreme Court reversed course, holding in *Lawrence v. Texas* that states *cannot* criminalize consensual same-sex relations. This was also the year that Massachusetts became the first state in the union to legalize gay marriage. Over the next ten years, sixteen additional states would make same-sex marriage legal.

In 2013, the US Supreme Court struck down DOMA, meaning that same-sex couples married under were finally eligible for benefits under federal law. Finally, in 2015, the Court's ruling in *Obergefell v. Hodges* meant that two people of the same-sex have the right to marry in every state in the union and that a same-sex marriage valid in one state must be recognized by every other state.

So what do all these changes mean for your estate plan? If you are married, you might be wondering whether you even need a plan at all. The answer is yes!

Marriage simplifies some legal situations. For instance, it gives spouses access to certain federal, state, and private benefits such as social security and health insurance. If you die without an estate plan, marriage entitles your spouse to a portion of your estate, although that portion is set by state law and might not be what you would choose.

But married couples without an estate plan are still vulnerable to rising medical costs, unpleasant fallout from divorce, skyrocketing long-term care bills, and uncertainty about what will happen to their hard earned wealth after they're gone. Without an estate plan, your loved ones could fall prey to family conflict, creditors and predators, and their own financial inexperience. Of special concern to those in the LGBT community is the fact that although marriage is now legal, discrimination still happens.

## **SEVEN MAIN CONCERNS**

Speaking of concerns, our work with LGBT clients has revealed seven main concerns when it comes to estate planning:

### **Government Interference, Taxes, and Fees**

When the government, and especially the courts, become involved in family matters, two things are almost inevitable: loss of privacy and increased expenses. With no estate plan, or with an inadequate one, major life events like disability and death usually require court involvement. This means that your personal business becomes public. It also means filing fees, other court costs, and attorney's fees.

Estate and inheritance taxes are another concern, particularly for those with large estates.

### **Healthcare Decision Making and Hospital Visits**

Historically, there has been fear and anxiety among LGBT couples that one partner would not be allowed to visit the other in the hospital. We've all heard the tragic stories where estranged family members have access and decision-making rights, while the partner is completely excluded.

Now that same-sex marriage is legal nationwide, you might assume that this kind of discrimination is no longer an issue. Sadly, this is not the case.

Prejudice lingers in some areas. This means that in some hospitals, simply saying you are married may not be enough. You could be faced with a

request for proof that you're married. The last thing you want to do during a health crisis is to leave the hospital to find a copy of your marriage license.

If you are unmarried, you need proof that your partner wants you to have access to his or her medical records, along with the authority to make medical decisions should the need arise.

## **Family Feuds**

We have all heard horror stories about family members fighting over a deceased loved one's money and possessions, and all of us want to avoid that situation.

The concern here is two-fold. First, you want to make sure that your possessions go to the right people, quickly and efficiently. Second, you want to keep the wrong people away from your estate.

Without a carefully made plan, people who have no desire to inherit from you can still make trouble for your heirs. They can contest your estate, extending the time it takes your loved ones to gain access to their shares and causing a great deal of anxiety in the process.

Even if you are married, disapproving relatives can use this tactic to cause delay and increase expenses paid from your estate. If you are not married and you have no plan, the situation is even more unpleasant. In this situation, state law gives your blood relatives priority when it comes to inheriting and makes no provision for your partner.

## **Predators and Creditors**

What will happen after your loved ones receive their inheritances? Most people want their hard-earned wealth to remain in the family, not be lost to scam artists, lawsuits, and the mistakes of naïve or inexperienced family members.

However, without an estate plan, this is a risk.

If you die without a plan – or with an inadequate plan – chances are the probate court will become involved in distributing your estate. Probate files are open to the public, meaning that anyone who wants to take a look has access to your personal and financial information.

This is precisely the information that scam artists use to prey on your relatives. It is not uncommon for bereaved family members to be

approached with “investment opportunities” and get rich quick schemes by people who have been to the courthouse to dig up the names of those who have recently inherited.

Predators are not the only threat to your loved ones’ inheritances. If your spouse or children are in debt or are named in a lawsuit that results in a judgment against them, their inheritances are vulnerable to collection by creditors. Estate planning offers tools to protect their inheritances.

## **Nursing Home and Medical Expenses**

Medical and long-term care expenses have skyrocketed in recent years. Many clients are worried that the wealth they have worked so hard to build might be eaten up by payments to a nursing home, leaving their loved ones with nothing.

Medicare pays for a portion of these expenses, including short-term nursing home stays; however, most long-term care costs are not covered. Medicaid covers most long-term care costs, but usually people must spend down a substantial portion of their assets before they qualify.

An accident, a stroke, or the diagnosis of a debilitating disease like Alzheimer’s can wreak havoc on a family’s finances.

## **Pet Care**

If you have pets, you know that they can become a part of your family. No one wants to think about their beloved animal companions going to an animal shelter. However, this is exactly what happens to thousands of pets each year when their owners become disabled or pass away.

Careful estate planning can help to ensure that your pets have a safe and loving place to call home in the event that you are no longer able to take care of them.

## **Passing On More than Money**

Although having a plan for your money and possessions is a top priority, an estate plan can do so much more for you and your family. It can be an ideal tool for you to capture and pass on your life story and experiences, and to help ensure that you leave the generations to come with a rich legacy of family history and values.

## **WHAT HAPPENS WITHOUT AN ESTATE PLAN**

So what happens if you become disabled or die with no estate plan...or with an inadequate plan?

Consider the story of Alan and Jeff. They have been together for 20 years, and were married in the summer of 2015, as soon as it became legal in their state. Alan has a daughter, Jessica, from a previous relationship. She lived with the couple from the time she was ten until she left for college, and Jeff considers himself her dad. Jessica is married and has two young children.

Alan and Jeff need an estate plan, so they call the only lawyer they know. He's a real estate lawyer, and he handled the closing on their home a few years ago. He lets the couple know that he is not an estate planning expert, but Alan and Jeff feel comfortable with him, so he drafts what he calls simple wills for them.

The terms of these wills are straightforward, and they seem to accomplish exactly what Alan and Jeff want. If one spouse dies, the other is to inherit all of his property. Once the second spouse dies, the couple's property goes to Jessica.

Alan and Jeff feel secure that their planning needs have been met. They take their wills to the bank and place them in their safe deposit box, and carry on with their lives.

A few years later, they begin to realize that their wills might not meet *all* of their family's planning needs. While he's doing yard work one Sunday afternoon, Jeff suffers a mild stroke and is rushed to the hospital.

Alan soon encounters his first hurdle; one that is not covered by his will. The staff at the hospital questions him about his relationship to Jeff. No one will give him any information about Jeff's condition unless he can prove that they are married. Alan is worried and anxious. Their marriage license is in the safe deposit box along with their wills, and the bank does not open until Monday morning. Finally, after a sleepless night, he goes to the bank, gets the license, and the doctor fills him in on Jeff's prognosis.

Jeff is released from the hospital after a few days, but the effects of his stroke linger. They're severe enough that he can't work, and he is unable to handle his finances or other important matters.

The couple now faces a second hurdle that is not covered by their wills.

## **Living Probate**

Alan does not have the authority to handle Jeff's investment accounts and other financial affairs. He has to go to court to be appointed Jeff's conservator, through a process often called living probate.

Ordinarily, we think of probate as something that happens after someone dies. However, conservatorship, designed to protect those who are mentally disabled, happens while a person is alive.

As Alan and Jeff find out, the living probate process is one they would have preferred to avoid. First, Jeff finds it humiliating to be brought into court and declared incompetent. Next, the couple discovers that even after Alan is appointed Jeff's conservator, he will be required to go back to court to get the judge's permission when he has to make certain major decisions on Jeff's behalf.

In addition to being time consuming, the process is expensive. It does not take long for court fees, attorney fees, and accounting fees to pile up. Fortunately, no one challenges Alan's request to be appointed conservator. Had a family member opposed his request, the couple would have faced more uncertainty and expense, not to mention a delay in the proceedings.

Alan and Jeff make it through the living probate process, and life is relatively smooth for a few years. Then, Jeff suffers another stroke and passes away. At this point, Alan realizes that the couple has fallen victim to a common estate planning misconception. They thought that having a will would allow them to avoid probate. They were wrong.

## **Death Probate**

Alan learns that the purpose of probate is to transfer ownership of a deceased person's property from his name to the names of his heirs and beneficiaries.

The deed to the couple's home is in Jeff's name, as is the title to Jeff's car and several of his other possessions, including a couple of bank accounts. Alan can't sell the car, refinance the house, or access the accounts until the probate court transfers ownership of these assets to him.

The will serves its purpose by giving clear instructions for who is to get Jeff's property, but it does not allow Alan to avoid the probate process.

So, Alan probates Jeff's estate. Again, he is lucky. No family members contest Jeff's will, and the process takes only four months. Some of Jeff's estate is spent on court, publication, and attorney fees. Alan learns that those with more complicated estates or more contentious relatives can spend many months or even years dealing with probate.



With probate behind him, Alan owns the entire estate, valued at \$800,000. He invests wisely, and over the next several years, the value of his estate grows to \$1.4 million. Alan never gets around to updating his estate plan, and his will is still in effect when he passes away.

This means that his daughter, Jessica, must now probate his estate. She goes through all the same hassles Alan did when Jeff's estate went through probate. As the sole beneficiary under his will, and when probate is finished, she transfers the money she inherits into joint accounts, shared with her husband, Mark.

## **Divorce**

A few years down the road, Jessica and Mark's marriage begins to fall apart. They separate and then decide to divorce. Since Jessica placed her inheritance into joint accounts, it is considered a marital asset. Mark walks away with about half of the inheritance in the divorce – definitely not an outcome Alan and Jeff intended.

## **ANATOMY OF AN EFFECTIVE ESTATE PLAN**

So far, we've focused on what happens when you have an ineffective estate plan (or no plan at all). You and your family are vulnerable to a long list of problems and perils, including living probate, death probate, and the divorce of your children, not to mention:

- Nursing home costs
- Threats to your loved ones from lawsuits and creditors
- No relief from federal or state death taxes
- No way to preserve your family's life values and stories

What does an effective estate plan look like?

The foundation of an effective estate plan is a living trust. You've probably heard of living trusts before, but you may not be clear on how they work. Here is a brief overview:

A living trust is a legal document that replaces your will. You have seen that probate is necessary to transfer ownership of property from a deceased person to his or her heirs. Part of the value of a living trust is that, while you're still alive, you transfer ownership of your property to the trust.

## **Probate Avoidance**

You maintain complete control of the trust while you're alive, and the trust includes instructions for how your property should be managed and distributed in the event of your disability or death. This way, if you die or become disabled, you don't "own" your property. Instead, the trust owns your property and a pre-arranged trustee takes over management of the trust. Since property does not have to be transferred from your name to your heirs' names, there is no need for probate.

## **Protection of Loved Ones**

Living trusts are extremely flexible, and an experienced estate planning attorney can customize your trust to meet the particular needs of your family. For instance, your trust can be designed to block any estate transfers outside of your loved ones. This means that if you pass away and your spouse or partner meets and marries someone new, the trust can require your spouse to get a prenuptial agreement in order to be authorized to manage the trust's assets. The arrangement keeps your property within your family, instead of having it lost to divorce or inheritance by the new spouse's children.

Your trust can also be customized to protect your loved ones' inheritances from creditors and predators. The level of access each of your loved ones has to his or her inheritance can be tailored to that person's age, financial experience, and life situation.

A young son who would rather buy a new super car than pursue his education or save for the future can be given limited access to his inheritance, subject to your trustee's judgment. An older daughter with a history of sensible decisions and strong financial management skills can be given greater access and discretion. The fact that both children's inheritances remain in trust offers them greater protection from lawsuits and creditors' claims.

## **Protection from Nursing Home Expenses**

An experienced estate planning attorney can also add a special Medicaid protection trust so that your assets are not depleted by nursing home costs before you have the chance to pass them on.

In order to be effective, this part of your estate plan has to be completed well before the need for long-term care arises.

## **Continuing Care for Pets**

You can use your trust to protect your fur babies, too. A pet trust allows you to appoint a caretaker for your pets and to give that person

instructions for exactly how your pets are to be cared for. You can also appoint an alternate caretaker in case the person you initially appoint is unable to take responsibility for your pets when the time comes.

You'll also name a trustee for your pet trust. This person is in charge of the funds you designate for the care of your pets.

Pet trusts can be enforced in court, giving you added peace of mind that your pets will, indeed, be well cared for.

## **Wisdom, Values, and Life Lessons**

A truly effective estate plan does more than help you leave a financial legacy. It gives you the tools to capture your memories, values, stories, and life lessons for your children, your grandchildren, and generations to come.

## **Health Care Decision Making**

What if you or your spouse is admitted to the hospital? You want to be sure that you can access medical information and make medical decisions for each other, should the need arise. Health care directives, the documents that allow you to do this, are another essential part of an effective estate plan.

## **WHO SHOULD YOU TRUST TO DESIGN YOUR ESTATE PLAN?**

Now that you know why you need a plan and have an outline of what an effective plan looks like, you'll need to find someone to help craft your plan.

For the peace of mind that comes with a truly effective plan, you'll want to deal with an attorney who is highly experienced and who focuses his or her practice on estate planning.

Estate planning is a nuanced and ever-evolving area of law. It is difficult, if not impossible, for lawyers who practice in other areas of the law to keep up with everything they need to know to ensure that you are fully protected.

Members of the American Academy of Estate Planning Attorneys are not only highly trained in estate planning law, they take a truly holistic view of the planning process and have the tools to provide you with the kind of estate plan that you and your loved ones deserve.

## About the academy

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by *Money Magazine*, *Consumer Reports Money Adviser* and Suze Orman in her book, *9 Steps to Financial Freedom*.

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