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Estate Planning Issues For LGBTQ+ Couples—Part 1

Whether you are married or in a committed partnership, estate planning is about much more than planning for death—it's about planning for life. It's the way to ensure your beloved will be protected and provided for in the event of your death or incapacity. If you are a member of the LGBTQ+ community, estate planning is even more critical.

Although same-gender marriage is legally recognized in all 50 states, long-held prejudices at both the political and family level continus to create complications for both married and unmarried same-gender couples. For example, suppose you have family members who are opposed to your marriage. In that case, your estate plan may be more likely to be disputed or even sabotaged by unsupportive relatives. This could mean that family members are more likely to contest your wishes. At worst, it might result in custody battles over non-biological children in the event of the biological parent's death.

Unsupportive family members may try to block the ability of your partner to make medical decisions on your behalf should you become incapacitated by accident or illness. Even worse, your family members could try to kick your partner out of a shared home. If you are in an accident or fall ill, they may even block your partner from seeing you if you require hospitalization.

Additionally, if you and your partner are unmarried, your partner would have no rights or protections should you become incapacitated or die without any planning in place. This leaves your partner vulnerable to several risks.

Given these issues, if you are in a committed partnership, you should be aware of several unique considerations regarding your estate plan. While you should meet with us, your estate planning lawyer, to address your specific circumstances, here are two pressing concerns to keep in mind:

1. A Will Alone Might Not Be Enough

Suppose you're unmarried and die without any estate plan in place. In that case, your property will be shared with your surviving family members according to your state's laws through intestate succession. The state's laws would not protect your unmarried partner, so if you want your partner to receive any of your assets upon your death, you need to—at the very least—create a will.

However, having an estate plan that consists solely of a will often doesn't provide sufficient protection for your spouse/partner. Therefore, we often recommend that same-gender couples—even those who are married—create both a will and a trust. A will is a foundational part of nearly every estate plan. For a variety of reasons, however, having just a will could leave your partner/spouse at risk.

First, a will does not work in the event of your incapacity, which could happen at any time before your death. Should you become incapacitated with only a will in place, your partner/spouse may not have access to needed funds to pay bills. They might even be kicked out of your home by a family member appointed as your guardian during your incapacity.

Furthermore, upon your death, a will is required to go through the often long, costly, and potentially conflict-ridden court process known as probate. By contrast, assets that are properly titled in the name of your trust would pass directly to your partner/spouse upon your death, without the need for probate or any court intervention.

If your relationship is not supported by one or both families, avoiding probate is especially important. If a family member doesn't support your relationship, they are more likely to contest your will during probate.

If your will is successfully contested, this could prevent your surviving partner/spouse from receiving assets you left in your will. The process of contesting is extremely time-consuming, costly, and emotionally draining for your surviving partner/spouse.

Typically, when an attorney drafts your will, it is not set up to protect your assets from creditors or lawsuits. However, leaving your assets in a trust that your partner/spouse can control would ensure the assets are protected from creditors, future relationships, and/or unexpected lawsuits.

2. Incapacity Planning is Especially Vital

As we touched on earlier, estate planning is not just about planning for your eventual death; it's also about planning for your potential incapacity due to injury or illness. Proactive estate planning allows you to name the person (or persons) you would want to make your healthcare, legal, and financial decisions for you if you are incapacitated and unable to make such decisions yourself through a medical power of attorney.

If you haven't planned for incapacity, the choice is then left to the court to appoint the person(s) to make these decisions on your behalf. If you're unmarried and the court appoints one of your relatives as your guardian, your family could leave your partner totally out of the

medical decision-making process and even deny them the right to visit you in the hospital. Even if you are married, it's not guaranteed that your spouse would have the ultimate legal authority to make such decisions.

Though the court typically gives spouses priority as guardians, this isn't always the case. This is especially true if unsupportive family members challenge the issue in court. To ensure your partner/spouse has the ability to make these decisions for you, you must grant them the legal authority to do so using medical power of attorney and durable financial power of attorney.

A durable financial power of attorney gives your spouse the authority to manage your financial, legal, and business affairs. This includes paying your bills and taxes, running your business, selling your home, and managing your banking and investment accounts.

In addition to creating a will and trust, you also want to create a living will, so that your spouse will know exactly how you want your medical care managed in the event of your incapacity. This is especially important at the end of life. Finally, don't forget to provide your partner/spouse with HIPAA authorization within the medical power of attorney so they will have access to your medical records. It will help them to make educated decisions about your care.

As your estate planning lawyer, we can support you in putting in place a robust estate plan that ensures your partner/spouse has the maximum rights possible if you are ever struck by a debilitating accident or illness.

Next week, in part two we'll discuss the final estate planning consideration for LGBTQ couples—securing parental rights for the non-biological parent of minor children.

This article is a service of Saeed & Little, LLP, estate planning lawyer. We do not just draft documents; we ensure you make informed and empowered decisions about life and death, for yourself and the people you love. That's why we offer a Family Wealth Planning Session™, during which you will get more financially organized than you've ever been before and make all the best choices for the people you love. You can begin by calling our office today to schedule a Family Wealth Planning Session and mention this article to find out how to get this $750 session at no charge.