

ESTATE PLANNING FOR SAME-SEX COUPLES

You may think the love and responsibilities you share with your partner are exactly the same as that of your non-gay family and friends, but alas, the law sees it another way. A marriage bestows concrete legal and tax benefits to both husband and wife. However, the laws generally do not recognize the same rights and privileges for same-sex couples. Since gay or lesbian couples lack the same concrete tax, inheritance and employment benefits that marriage bestows, these benefits must be created through the use of estate planning documents and contracts.

The Estate Plan You Can't Afford

For those who have not planned their estate, you may be happy to know that the State of California has prepared an estate plan for you free of charge. This State provided estate plan is referred to as "intestacy." Under the laws of intestacy, the estate of a person who dies without a will or trust will pass (after lengthy and costly probate proceedings) to biological relatives under the traditional family model.

There are two problems with intestacy. The first and most important problem is that most state intestacy laws discriminate against same-sex couples in that gay and lesbian relationships are generally considered invalid for purposes of distributing the estate of a deceased partner who dies without a will. Generally, under intestacy laws, a surviving partner will be left with nothing upon the death of a partner. This is true irrespective of the length and intensity of the relationship between the deceased partner and the surviving partner. California, however, has made substantial progress in reversing this discrimination. Under the laws that took effect on January 1, 2005 ("AB 205"), if a domestic partner dies without a will, trust or other estate plan, the surviving registered domestic partner will inherit a portion of the deceased partner's

estate provided that both parties are registered with the California Secretary of State as domestic partners. The fraction of the estate the surviving domestic partner will be entitled to will depend on when the assets were acquired (prior to registration or after registration) and whether the deceased domestic partner has surviving children or other relatives. The fraction is determined as follows:

- The surviving registered domestic partner will inherit all of the deceased partner's community property (assets earned after registration of the domestic partnership).
- If the deceased partner was not survived by any children, grandchildren, parents, siblings, nieces or nephews, the registered surviving domestic partner will inherit all of deceased partner's separate property (assets earned or acquired prior to registration of the domestic partnership or received by gift or inheritance after registration of the domestic partnership).
- If the deceased partner was survived by one child (or descendants of a deceased child), or was survived by parents, siblings nieces or nephews, the surviving partner will receive one-half (1/2) of the deceased partner's separate property.
- If the deceased partner was survived by more than one child, or one child and the descendants of one or more deceased children, or the descendants of two or more deceased children, the surviving partner will receive one-third (1/3) of the deceased partner's separate property.

Keep in mind that this law is only applicable to California residents who have registered as domestic partners with the California Secretary of State and only with respect to property located in California.

In spite of the progress made in California, it is inadvisable to rely on intestacy laws in place of estate planning. If your partner is survived by any family whatsoever (parent, sibling, niece or nephew), and had separate property, you run the risk of inheriting no more than one-half (1/2) of the deceased partner's separate property. Furthermore, to the extent that you or your partner own assets outside of California or if you should move to another state, this California law will be inapplicable.

In addition, irrespective of your registration status, all property that is distributed to your partner, family, friends or other beneficiary according to California intestacy laws will be subject to "probate."

What is Probate and Why Should it be Avoided?

Simply stated, probate is a legal process in which your property is identified, inventoried, and distributed to your heirs after your death.

There are three important reasons you may wish to avoid probate. First, it is expensive. The fee for probate is set by statute in California. For ordinary services, the executor and attorney are entitled to compensation based on the total appraised value of the estate (before subtracting debts) as follows:

- Eight percent (8%) on the first \$100,000
- Six percent (6%) on the next \$100,000
- Four percent (4%) on the next \$800,000
- Two percent (2%) on the next \$9,000,000

IT IS IMPORTANT TO REALIZE THAT THE FEES FOR PROBATE ARE CALCULATED BASED ON THE GROSS VALUE OF THE ESTATE, REGARDLESS OF MORTGAGES OR OTHER DEBTS OWED.

The following example illustrates the potentially disastrous effects of probate. Jane M. bought a house valued at \$200,000 and paid a \$25,000 down payment. She then died. Although she owned only \$25,000 of the house, probate fees were calculated based on the full value of the property. Jane's estate owed the executor \$7,000 and the probate attorney \$7,000, for a total of \$14,000 in probate fees!

A second reason to avoid probate is that it often ties up your assets for a long time. While the estate is going through the probate process, a lack of liquidity (cash flow) can create problems for your heirs. They may have to pay your mortgage or other debts, or they may be trying to keep your business running. They will need ready cash, but it can be very difficult to sell assets before the probate is complete. An average probate can take 12 to 18 months, resulting in severe financial problems for your partner, friends, family or business.

Third, the probate process can involve many visits, letters, and phone calls between the attorney and the executor, and can place a physical and emotional burden on the survivors. The grieving process is difficult enough without the bother and disturbance that is often involved in probating an estate.

How to Provide for Loved Ones

In order to ensure that certain property will actually be received by your partner or your friends, you must use a will, joint tenancy or a living trust. As explained before, because of intestacy laws, it is unwise to assume that because you are registered domestic partners, that will be enough proof of your intent, and that therefore your partner will be able to inherit your assets (particularly your separate property). You must have an estate plan other than intestacy.

What a Will Can and Cannot Do

A will is a document in which you identify to whom your property shall be given after you die. Through a will, you can leave your property to anyone you choose, in whatever proportions you choose, including leaving everything to your partner. If you have minor children, you can name a guardian for them in the will.

For individuals who believe that a simple statutory will form is adequate for their needs, the estate planning process has recently been simplified. AB 25 revised the statutory will form to include registered domestic partners in the class of beneficiaries to whom a testator may leave assets and property.

There are two major drawbacks to using a simple will as your primary estate planning device. First, ANY PROPERTY PASSING TO YOUR PARTNER, FAMILY, FRIENDS OR OTHER BENEFICIARY PURSUANT TO A WILL IS SUBJECT TO THE COSTLY AND TIME-CONSUMING PROCESS OF PROBATE. Secondly, a will can be, and frequently is, contested by the family of the decedent, especially if they have not come to terms with the decedent's choices during life. In addition, a will is public, which means that anyone can go to the courthouse and see your will after you die.

Drawbacks of Joint Tenancy

Owning assets in joint tenancy can also be a useful way to transfer property to your partner. When one joint tenant dies, the remaining joint tenants automatically own the entire asset without probate. For example, if you own a house in joint tenancy with your partner, when you die your partner will own the entire house.

However, you should keep in mind that joint tenancy does not eliminate probate, but only delays it. This is because although the jointly held property passes to the surviving joint tenant without probate, the property is

ultimately subject to probate upon the death of the survivor.

One drawback is that by putting an asset owned by you into joint tenancy with your partner, you are making a gift to him or her right now. If you want or need that asset back later, you may not be able to get it back. Gifts between unmarried individuals are subject to gift tax. In addition, PROPERTY OWNED WITH SOMEONE ELSE AS JOINT TENANTS IS COMPLETELY SUBJECT TO THE CREDITORS AND LIABILITIES OF EACH JOINT TENANT. Thus, even though you contributed the funds to purchase the property, and you are a 50% owner of the property as a joint tenant, you may lose the property altogether if your partner is the losing party in a lawsuit or has outstanding liabilities.

Another drawback few people consider when placing property in joint tenancy is the lack of control over the property's ultimate disposition after the death of your partner - the surviving joint tenant. Because the property is entirely owned by the remaining joint tenant, you have no say or control over what happens with the property after the death of the surviving joint tenant. The surviving joint tenant may dispose of the property, gift it or bequeath it to whomever he or she chooses. Although most clients wish that their property be available for their partner after they die, they would prefer that after the death of the partner, whatever is left of the property should go to their family or other heirs.

What You Should Do

For anyone in an unmarried partnership, it is important to have some form of estate planning in order to avoid disinheriting your partner. If you do not have an appropriate plan in place, state law will take over, your assets will be tied up in the lengthy and expensive probate process and ultimately distributed according to a "one-way-fits-all" system which may not reflect your intent.

By following the suggestions listed below, you can avoid many of the woes discussed herein and others.

1. Avoid Probate With a Revocable Living Trust.

A living trust is a good way to avoid the expense and delay of probate while still ensure the transfer of your assets to your partner and/or friends after death. In the living trust document, you name the persons who shall receive your assets (“beneficiaries”) and you appoint someone who will apportion the trust assets after you die (“trustee”). After signing the living trust document, you continue to own and fully control all of your assets.

A living trust permits the smooth, inexpensive transfer of assets after death, without the court-supervised probate process. It makes it easier for your partner and for your family. In addition, a living trust is much less open to challenge than a will. Courts are less likely to overturn it since you put the living trust into place and lived with it during your lifetime. In addition, a living trust is private meaning that after you die, no one except the beneficiary has the right to know how you allocated your assets.

In addition, in creating a living trust, you will have the option of keeping the assets in trust for your beneficiary rather than distribute them outright. This way, your beneficiary can have full use and access to the assets during his or her lifetime, and if there is anything left upon the beneficiary’s death, that will be distributed to other beneficiaries you have predetermined.

2. Plan for Incapacity with a Durable Power of Attorney and an Advance Health Care Directive.

Through a document called a Durable Power of Attorney (DPA), you can appoint your partner and/or friend to act as your agent, with

authority to make certain decisions for you. The DPA goes into effect only if you become legally incapacitated, which must be certified in writing by your doctor. Then, your agent will step in and perform the actions which you have outlined in the DPA. Examples of actions you may authorize your agent to perform are: making your mortgage payments, collecting money due to you and depositing it in your bank account, paying bills, and even keeping your business running. The DPA can be drafted to include as many or as few different transactions as you wish.

If you do not prepare and sign a Durable Power of Attorney, someone will have to petition in court to be appointed as your agent. This can be expensive, time-consuming, and distressing to all involved, especially if there is a conflict between your partner and a family member.

There is another instrument similar to the Durable Power of Attorney, called the Advance Health Care Directive(AHCD), in which you appoint an agent to make health care decisions for you if you become incapacitated. The need for an AHCD has been lessened due to California’s improved domestic partnership laws which grant the right of registered domestic partners to visit their partners in the hospital. No AHCD is required for visitation. If any other family member of a hospitalized domestic partner objects to the other partner’s visiting privileges, the hospital or health facility is nevertheless legally obligated to provide the domestic partner access to the hospitalized partner. Only if visitation is generally curtailed for a bona fide purpose, such as the hospitalized partner’s health, may a facility deny visitation.

Nevertheless, it is prudent to execute an AHCD to complement and clarify your rights. Hospitals are often unfamiliar to the rights of domestic partners but routinely encounter and honor AHCDs. For partners who are not

registered with the California Secretary of State as domestic partners, it is still essential to execute an AHCD. In addition, the AHCD affords you an opportunity to make important decisions regarding your health care and your body. For example, in the AHCD you can express whether you would like to be placed on life support if doctors have determined that there is no chance of recovery. Furthermore, if you travel or move to another state, it is unlikely that domestic partners will be afforded the same rights as provided under California law. For partners who are not registered with the California Secretary of State as domestic partners, it is still essential to execute an AHCD.

Conclusion

An estate planning attorney can help you put the documents into place, including the Revocable Living Trust, DPA and AHCD, which will protect you during life, enable your partner to have meaningful participation in case of an emergency and provide for your partner and loved ones upon your death in the fastest and most cost effective method available.

Do not wait until later to put your estate in order. Do it now and know that you are in good shape.

For more information or a free initial consultation, please contact the LAW OFFICES OF AFSHIN A. ASHER.

About Afshin A. Asher

Afshin A. Asher, LL.M., is the founder and sole proprietor of the Law Offices of Afshin A. Asher, Inc., a “boutique” law firm located in Century City, Los Angeles that specializes in estate planning and administration. He helps clients with estates of all sizes achieve their lifetime and testamentary goals in a way that maximizes wealth while minimizing taxes and costs.

Mr. Asher’s highly developed knowledge of both the legal and the tax aspects of various strategies makes him especially qualified to assist clients with estate planning matters. He combines expertise in federal estate, gift and generation-skipping transfer (GST) taxes with extensive experience with the unique estate planning challenges faced by gay and lesbian couples. For over eight years, Mr. Asher has also volunteered on a monthly basis at the Legal Services Department of the Los Angeles Gay and Lesbian Center.

A member of the California State Bar, Mr. Asher has been certified as a Specialist in Estate Planning, Trust and Probate Law by the Board of Legal Specialization of the State Bar of California. He is also a member of the Trust & Estates section of the Beverly Hills Bar Association, the Los Angeles Bar Association and the Beverly Hills Estate Planning Council.

Mr. Asher holds a Master of Law Degree (LL.M.) in Taxation with honors from Golden Gate University. He attained his law degree at Southwestern University School of Law, where he graduated Cum Laude in the top 10% of his class, was a published member of the Southwestern University Law Review, and was a four-time recipient of the American Jurisprudence Award.

For more information about Mr. Asher, his firm or the services he provides, please call us at 310-788-0444 or e-mail Mr. Asher directly: afshin@LATaxLawyer.com.