



Del Mar Caregiver Resource Center
A program of Health Projects Center

Fact Sheet

Legal Issues for LGBT Caregivers

For Lesbian, Gay, Bisexual, Transgender (LGBT) persons of any age—and especially for older adults—certain legal and financial issues become increasingly important. These determine who has the responsibility to provide care, the power to make medical decisions, and the legal authority to utilize financial resources on someone’s behalf if they are incapacitated. As a caregiver to a partner, friend or family member, it is essential to discuss with the care recipient what legal protections are available and become familiar with the limitations of these protections.

Since most states do not recognize LGBT committed relationships, referred to here as *same-sex relationships* or *domestic partnerships*, LGBT couples need to complete certain legal documents prior to incapacity.

Some members of the LGBT community rely on their “family of choice,” a group of trusted and valued friends who provide care and support during an illness. However, without legal protections in place, these relationships might not be legally recognized, and could easily be questioned or contested by a biological family member. It is imperative that LGBT caregivers and care recipients understand relevant local, state and federal laws and act to secure legal protections.

Q: What is the status of Domestic Partnerships?

A few states (including California, Connecticut, Rhode Island and Hawaii) have enacted laws granting limited legal rights to same-sex couples. Vermont passed a civil union law in 2000 that gives same-sex couples the same rights given to legally married spouses under Vermont law.

In California, the Domestic Partnership law (AB25) allows persons of the same sex and persons of the opposite sex over the age of 62, and who have properly registered with the State, to visit an ill domestic partner in the hospital and make limited health care decisions. A domestic partner may also sue for the wrongful death of a partner. Additionally, the law provides that a domestic partner with a court order has standing equal to that of a spouse or a child, to be appointed conservator of the partner’s estate if s/he is alive but no longer competent to handle finances. However, AB25 does not provide for automatic inheritance rights. There is *no intestate succession* (meaning without a Will, the domestic partner would not enjoy the same rights to the partner’s estate as a spouse would in a heterosexual marriage.) This new law also does not provide for automatic appointment of an *attorney in fact* or *agent* to make any financial, business, real estate, or legal decisions for an incapacitated domestic partner.

Health Projects Center’s
Del Mar Caregiver Resource Center
Serving Monterey and Santa Cruz Counties

(831) 459-6639
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www.delmarcaregiver.org

These issues and other related issues are of major importance to LGBT caregivers. It is vitally important that LGBT persons in domestic partnerships seek out and complete legal documents, which afford them comparable, if still not equal, rights. Partners who have domestic partnership should obtain legal advice in their state of residence regarding these issues.

Q: What should an LGBT caregiver and care receiver do as soon as possible and prior to incapacity of either person?

The following steps (discussed in greater detail below) should be considered:

- **Create a Basic Estate Plan** consisting of a *Will* or *Living Trust*, *Powers of Attorney (POA) for Property and Financial Management*, and *Durable Power of Attorney for Healthcare* (in California called an Advance Health Care Directive). Be sure to get this done NOW.
- **Review any and all existing estate planning documents:** Are they complete? Are they still legally effective? Are they up to date (current state laws, all assets covered, proper beneficiaries named, etc.)?
- **Plan for Old Age, Illness and Disability:** Investigate long-term care insurance, (coverage for both at home and nursing home care), and consider disability insurance.
- **Provide for Liquidity:** Consider investing in life insurance, in part, to provide sufficient assets for a surviving partner to remain in the home.

Q: What do LGBT couples need to do for estate planning?

For your own protection and for the protection of a loved one, estate planning is an absolute necessity. Timing is also very important. As soon as possible, especially where illness has been identified, or if a person is advancing in age and infirmities, the following documents should be executed: a *Will* or a *Living Trust*; *Durable Power of Attorney for Finances and Property* and for *Health Care*.

It is also necessary to review deeds to houses and other property and determine if the beneficiaries listed, including those listed on insurance policies, are up to date. Creating and executing living-

together and property agreements may also be desirable or practical at this time. An attorney working with you will be able to advise you or offer you the proper source of information.

Q: What does a Will provide?

A Will provides that when someone dies, everything owned (the person's estate) goes to the people the deceased wanted to remember (the named *beneficiaries of the will*) and NOT to anyone else. If there is not a properly executed Will when a person dies, the *laws of intestacy* in the state in which s/he lives determine who gets everything unless there is a named beneficiary (i.e., on life insurance or an IRA) or if s/he held the property in *joint tenancy* (i.e., a home or bank account) or *in trust* (bonds or a bank account).

A same-sex partner or a friend not named as a *beneficiary* in a Will, or as a *joint tenant* on a property deed or in *trust* could find all the property belonging to the deceased going to his or her children, parents, siblings or other family members or even to the state. This result is easily avoided with a properly written Will.

Q: What is a Revocable Trust?

Another type of legal document that LGBT persons receiving and giving care may want to consider is a trust. Like a Will, a trust provides for an orderly distribution to beneficiaries of a person's assets upon death. A trust also has incapacity language in it, which may become effective before death. Should a trustor become unable for whatever reason or however long to properly manage his/her estate, a named successor trustee may step in and exercise those powers enumerated in the trust. It is a good idea to ask an attorney to compare trusts and wills to help you decide the most effective document for carrying out your wishes.

Q: What is a Durable Power of Attorney for Property/Finances?

A Durable Power of Attorney for Property/Finances will ensure that if a person becomes legally incapacitated, the designated agent will be able to manage all property and financial affairs. For LGBT care receivers and caregivers the DPA/F is a very powerful document. Without this documentation, an LGBT partner or friend will find it is very difficult if not impossible to take care of important

legal and financial transactions when a loved one is incapacitated.

Q: What is an Advance Health Care Directive or Durable Power of Attorney for Health Care?

An Advance Health Care Directive (in California) or a Durable Power of Attorney for Health Care (so named in most other states) ensures that all health care needs and desires are carried out and monitored by a trusted person—the *agent* or *attorney in fact*—when the principal can no longer make those decisions or communicate them to health care providers. This document contains the instructions regarding a care recipient’s wishes and desires for health care, including what treatment is not desired, such as a Do Not Resuscitate/DNR order.

Q: What if there are minor children?

If an LGBT person has a minor child who has not been adopted by the same sex partner, it is imperative that s/he execute a Will. Wills are the only form of testamentary document in which a *guardian* for a minor child may be nominated, where a testator may leave instructions about the child’s education, place of residence, and what can be done in the event of a child’s illness. The guardian will still have to be appointed by court order.

Q: What other planning issues are important for LGBT persons?

Long Term Care/Skilled Nursing Facility and Medicaid: Neither Medicare nor regular health insurance pays for ongoing custodial care provided in a skilled nursing facility or nursing home. Care must be paid privately from a person’s assets, through private long-term care insurance policies or by Medicaid (Medi-Cal in California). There are two major areas of concern caregivers should be aware of:

- Medicaid eligibility regulations, and
- Regulations controlling the recovery of monies paid out by Medicaid from the estate of the deceased recipient.

Medicaid has very complex rules which vary from state to state. LGBT caregivers should consult with an elderlaw attorney who is sensitive and knowledgeable about Medicaid (Medi-Cal) regulations to

determine how best to protect a home, savings and any additional assets and property.

Social Security Benefits: There are no Social Security, SSI (Supplemental Security Income) or Social Security Disability benefits available to LGBT couples after the death of a partner. Currently, Domestic Partnership agreements have changed nothing with regard to Social Security benefits in relation to a surviving partner.

Death and Property Tax Reassessment: Even if a home is properly willed to a survivor or held in joint tenancy, LGBT partners do not have exemption from reassessment of property taxes at death. The IRS presumes that the first person to die owned all of the jointly held property. The survivor has the task of presenting years of receipts and tax returns showing the property was jointly owned. What can be even more damaging is that the passage of property from a joint tenancy to a sole owner is considered a change of ownership and triggers a property tax reassessment that could result in taxes beyond the survivor’s ability to pay. It may be advisable to think seriously about investing in life insurance that could provide liquidity and assets to pay for increased property tax.

Q: How do I find an elderlaw attorney who is LGBT sensitive?

First, ask friends about someone they’ve worked with. LGBT groups or organizations in your area (especially LGBT senior organizations) may be able to provide referrals. Another way to get referrals for an elderlaw attorney is by contacting an estate planning attorney whom you know or have been referred to. Also check the elderlaw resources provided in this document.

The following FCA Fact Sheets are recommended to provide further details not included here: *California Advance Health Care Directive; Durable Powers of Attorney and Revocable Living Trusts; Legal Planning for Incapacity; LGBT Caregiving; Frequently Asked Questions.*

Recommended Readings

Legal Affairs: Essential Advice for Same Sex Couples, Fred Hertz, 2002, Henry Holt and Company, 115 West 18th St., NY, NY 10011. See also: www.samesexlaw.com.

Four Steps to Financial Security for Lesbian Gay Couples, Harold Lustig, 1999. The Ballantine Publishing Group, 1540 Broadway, NY, NY 10036, www.randomhouse.com.

Estate Planning for Baby Boomers and Retirees: A Comprehensive Guide to Estate Planning, Stewart H. Welch III, 1998, Simon and Schuster Macmillan Company, 1633 Broadway, NY, NY 10019.

A Legal Guide for Lesbian and Gay Couples, Denis Clifford, Frederick Hertz & Hayden Curry, 2002, 11th ed., Nolo Press, 950 Parker St., Berkeley, CA 94710, (800) 728-3555. www.nolo.com.

Resources

Family Caregiver Alliance

180 Montgomery Street, Suite 1100
San Francisco, CA 94104
(800) 445-8106, (415) 434-3388
Web Site: www.caregiver.org
E-mail: info@caregiver.org

Family Caregiver Alliance (FCA) seeks to improve the quality of life for caregivers through education, services, research and advocacy.

Through its National Center on Caregiving, FCA offers information on current social, public policy and caregiving issues and provides assistance in the development of public and private programs for caregivers.

For residents of the greater San Francisco Bay Area, FCA provides direct support services for caregivers of those with Alzheimer's disease, stroke, head injury, Parkinson's and other debilitating disorders that strike adults.

National Center for Lesbian Rights (NCLR)

870 Market St., Suite 570
San Francisco, CA 94102
(415) 392-6257
www.nclrights.org

The National Center for Lesbian Rights is the only national legal organization with a primary focus on lesbians and their families. NCLR also advocates on behalf of other groups in the LGBT community. Main program areas are family law, youth rights, elder law, immigration and asylum, and transgender rights.

State Bar of California

180 Howard St.
San Francisco, CA 94105-1639
(415) 538-2000
www.calbar.org

The State Bar has Attorney Referral Services and a Legal Services Section, as well as a Subcommittee on Legal Problems of Aging.

Bay Area Lawyers for Individual Freedom (BALIF)

P.O. Box 421983
San Francisco, CA 94142-1983
(415) 956-5764
www.BALIF.org

BALIF is a Minority Bar Association of lesbians, gay men, bisexuals, transgendered persons and their supporters, with over 500 members including judges, lawyers, legal workers and law students. It is a helpful resource for information about laws affecting the greater LGBT community.

Lambda Legal Defense and Education Fund

Western Regional Office
6030 Wilshire Blvd., Suite 200
Los Angeles, CA 90036
(323) 937-2728
www.lambdalegal.org

With headquarters in Washington, D.C., and regional offices in the East, Midwest, South and West, LAMBDA is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender persons and persons living with AIDS through litigation, education and public policy work.

National Academy of Elder Law Attorneys

1604 North Country Club Rd.
Tucson, AZ 85716
(520) 881-4005
www.naela.com

Information on how to choose an elder law attorney and referrals to elder law attorneys.

California Advocates for Nursing Home Reform (CANHR)

1610 Bush St.
San Francisco, CA 94109
(415) 474-5171
(800) 474-1116 (in CA)
www.canhr.org

CANHR provides advocacy, consumer education and legal information throughout California on nursing home-related issues.

Internet resources:

www.gaylawnet.com

An up-to-date internet resource for learning about US, state and county laws of particular interest to the LGBT community.

Local Resources

MONTEREY COUNTY

Health Projects Center's

Del Mar Caregiver Resource Center

(831) 424-4359

Web site: <http://www.delmarcaregiver.org>

SANTA CRUZ COUNTY

Health Projects Center's

Del Mar Caregiver Resource Center

(831) 459-6639

Web site: <http://www.delmarcaregiver.org>

SAN BENITO COUNTY

Health Projects Center's

Del Mar Caregiver Resource Center

(831) 459-6639

Web site: <http://www.delmarcaregiver.org>

Del Mar Caregiver Resource Center supports and assists caregivers of brain-impaired adults through education, research, services and advocacy.

For residents of Central California, Monterey, Santa Cruz and San Benito Counties, Del Mar CRC provides direct family support services for caregivers of those with Alzheimer's disease, stroke, head injury, Parkinson's and other debilitating brain disorders that strike adults.

This fact sheet was written by Helene V. Wenzel, an attorney at law in private practice specializing in estate planning, wills, trusts, probate and conservatorships. She is a member of Bay Area Lawyers for Individual Freedom (BALIF), the National Center for Lesbian Rights (NCLR) and the National Academy of Elder Law Attorneys (NAELA). Reviewed by the National Center for Lesbian Rights. Prepared by Family Caregiver Alliance (FCA) with funding by the San Francisco Office on the Aging through the National Family Caregiver Support Program. © 2002 All rights reserved.