



Fact Sheet: **Legal Issues for LGBT Caregivers**

Introduction

Lesbian, gay, bisexual, and transgender (LGBT) people have witnessed two of the most dramatic and far-reaching changes to their rights in the last three years. In 2010 Edith Windsor, a woman in her 80's, challenged the U.S. Supreme Court (*U.S. v. Windsor*) in order to receive the pension of her deceased life partner of 44 years duration. The pension had been denied to her because they were not married as Husband and Wife under DOMA, the Defense of Marriage Act. On June 26, 2013, the U.S. Supreme Court ruled that Section 3 of DOMA, which had defined marriage as between a man and a woman as husband and wife, was unconstitutional. From that date forward, the federal government had to recognize same-sex marriages approved of by the states. At the time, only 37 states recognized and protected same sex marriage. Two years later to the day, on June 26, 2015, the Supreme Court's long-awaited landmark decision in *Obergefell v. Hodges* handed down a guaranty to same-sex couples in all the states throughout the nation the right to marry and the right to have those marriages recognized at the federal level. Both of these Supreme Court decisions greatly advanced LGBT rights.

Nevertheless, even with these decisions in place, lesbian, gay, bisexual, and transgender people, in couples or not, will still face increasingly important legal

and financial decisions as they age. These legal and financial decisions, the documents that enforce them, and the agents that you name in them will determine who has the legal authority to confer with your doctors and to make medical decisions for you; and who has the legal authority to manage your financial resources if and when you become incapacitated; e.g., legally unable to act on your own behalf.

Unlike heterosexual aging adults who have extended families through marriage over generations, many LGBT people must turn to their "family of choice" for caregiving needs. These chosen families are trusted and valued friends who have provided emotional and social support to one another over the years. Without written protections in place, these chosen family members will not be legally recognized and could very easily be questioned or contested by a biological family member. You may know people who have had this experience.

As a caregiver to a spouse, partner, or friend, it is essential to discuss available legal protections and their limitations with the person for whom you care before that person becomes incapacitated. Time is of the essence. Incapacity can happen in a heartbeat with a stroke or in a car accident.

Because many of these documents are state-specific, it is best to work with an attorney in your state when

putting together advance directives and other legal documents. For help finding an LGBT-friendly attorney in your area, see the Resources section of this fact sheet.

Creating an Estate Plan

For his or her own protection and for yours, estate planning is an absolute necessity for the person for whom you provide care. Every LGBT person should have these documents in place, but this is especially true for partnered LGBT people where illness has been identified or if a person is advancing in age and infirmities. Estate planning documents to have in place include:

A Will

A Will (often called a Last Will and Testament) is a legal document that allows you to designate who will receive your property when you die and how and when they will receive it. If there is not a properly executed* Will when a person dies, the laws of intestacy in the state in which he or she lives determine who gets everything unless there is a named beneficiary on the asset (i.e., on life insurance or an IRA) or if he or she held the property in joint tenancy with another (i.e., a home or bank account) or in trust (i.e., named on bonds or bank accounts).

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 the deceased's children, parents, siblings, or other biological family members against the deceased's intention. These undesirable results are easily avoided with a properly written Will. **With the advent of the internet and the availability of Will forms, it is very**

important that a Will be printed out and properly executed according to the laws of the state.

Note: A Will is only effective when you die. It is only about what happens to your property when you die.

* **Properly executed** generally means that when you sign legal documents, it is in the presence of witnesses and in accordance with the laws of your state.

If an LGBT person has a minor child who has not been adopted by the same-sex partner, it is imperative that he or she execute a Will. **Wills are the only form of testamentary document in which a Guardian of Minor Children may be nominated.** In a Will, the testator may leave instructions about the child's education and place of residence and nominate the person or persons who will have authority in the event of a child's illness. The nominated guardian will still have to be appointed by court order.

A Revocable Trust

Another type of legal document that LGBT people receiving and giving care may want to consider is a Trust, which is also called a Living Trust or a Revocable Trust. Like a Will, a Trust provides for an orderly distribution to beneficiaries of a person's assets upon death. But, unlike a Will, a Trust also has incapacity language in it, which may become effective before death. Also, unlike a Will, which simply lists your assets to be distributed, assets must be legally transferred into the Trust; it then holds these assets "in trust." Should a trustor (the person making the Trust) become unable (incapacitated) for whatever reason or however long to properly manage his or her estate, a named successor trustee may step in

and exercise those powers enumerated in the Trust during the trustor's life. Trusts are also important because they avoid a Probate at death. Probate is a court-controlled distribution of the deceased's property. In California, Probate is a long and costly process.

Note: 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.

A Durable Power of Attorney

A Durable Power of Attorney, also known as a Durable Power of Attorney for Property and Finances (DPAP) will ensure that if a person becomes legally incapacitated, the designated agent (also called an "attorney-in-fact") will have legal authority to manage all financial affairs and property including real property. For LGBT care receivers and caregivers, the Durable Power of Attorney for Property and Finances 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. As with Wills, it is possible to download a DPAP form from the internet. Again, it is important that these be state-specific and properly executed. If there is real property involved, the DPAP should be notarized.

Note: Banks are especially reluctant and often resistant to working with anyone, but the person named on the account. Once a DPAP has been executed, it is a good idea to take it to the banks where there are assets and to have it filed or, otherwise, recognized. Some banks will have their own forms. Examine them carefully before you sign them. Always request that the DPAP be attached to any bank forms.

An Advance Health Care Directive

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 healthcare needs and desires are carried out and monitored by a trusted person—the agent or attorney-in-fact named in the document—when the principal can no longer make those decisions or communicate them to healthcare providers. This document contains the instructions regarding a care recipient's wishes and desires for healthcare including what end-of-life treatment is and is not desired such as intubation, ventilators, or hydration. There is also room on attorney-drafted forms for burial, funeral, and memorial directions as well as organ and whole-body donation. A short form of the Advance Health Care Directive is available on the internet. These are also state-specific. Again, once downloaded and printed out, the document must be properly executed.

Additional forms for healthcare include a **Living Will; Do Not Resuscitate (DNR) order;** and a **Physician's Orders for Life Sustaining Treatment (POLST).** Some people don't have anyone they trust (or want to burden) to be their agent. They can still make their wishes about end-of-life care known directly to the medical personnel. Whichever documents they execute, a copy should be given to the primary physician and/or health care agency.

Keeping Documents Up to Date

If the person for whom you care already has some or all of these documents drawn up, make sure they are up to date (current with state law, all assets are covered, proper beneficiaries are named, etc.) and complete. Banks have

been known to refuse to honor a DPAP that is more than 2 or 3 years old. Deeds to houses and other property, insurance policies, and financial accounts should be examined to determine if the beneficiaries listed are up to date. Other components of an estate plan may include long-term care insurance with coverage for both in-home and nursing home care and disability insurance. Ask the person for whom you care if he or she intends to use either of these to pay for care.

Note: All of these documents are vital to a person's well-being in life and orderly distribution of assets at death. For these reasons, it is risky to rely on pre-packaged trust packages bought on the internet or in a commercial publication. To protect yourself, it is essential that you consult a knowledgeable attorney who is familiar with the law in your state. See the list of available resources at the end of this article.

Social Security

Social Security is another important matter for LGBT couples to consider in estate planning. Social Security benefits have just become available to legally married same-sex spouses. It may be worth your while to explore the best way to take Social Security benefits.

Holding Real Property Together

It is important to check out the tax liabilities when a home is owned by unmarried same-sex partners. Reassessment of the property at the death of the first to die may result in an increase in property taxes making it financially impossible for the surviving partner to keep the home. These property laws differ by state and in different counties. Making an appointment with an attorney or an

accountant may be in order if this is a concern. It may be advisable to think seriously about investing in life insurance that could provide liquidity and assets to pay for increased property tax. If unmarried, 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.

We just reviewed these four estate planning documents. Which ones still need to be completed for your current and/or future caregiving situation?

- **Will**
- **Living Trust**
- **Durable Power of Attorney for Property and Finances**
- **Advance Health Care Directive or Durable Power of Attorney for Health Care**

Medicare and Medicaid (Medi-Cal in California)

Medicare is available to everyone who worked and accumulated enough years to be eligible at 65. Medicaid, on the other hand, is a means-tested program available only to those whose assets meet the eligibility levels. **Neither Medicare nor regular health insurance pays for ongoing custodial care provided in a skilled nursing facility or nursing home beyond specific short-term rehabilitation coverage.** Care must be paid privately from a person's assets, through private long-term care insurance policies, or by Medicaid. There are two major areas of concern caregivers should be aware of:

- Medicaid eligibility regulations
- 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 **elder law attorney** who is sensitive to LGBT issues and knowledgeable about Medicaid (Medi-Cal) regulations to determine how best to protect a home, savings, and any additional assets and property.

To find an elder law attorney, first ask friends in similar circumstances if they have worked with someone. LGBT groups or organizations in your area—especially LGBT senior organizations—may also be able to provide referrals. Also check the Resource section of this fact sheet. You may consider asking an estate planning attorney whom you know or have been referred to if they regularly work with someone on elder law issues. You can also contact the National Academy of Elder Law Attorneys at www.naela.org.

Other Legal Tools

Outside of the estate planning documents described above, your loved ones may also consider the following:

- **Living Will:** A Living Will gives instructions for treatment and allows people to specify which life-sustaining actions should be taken in the event they can no longer make decisions or express their desires. It is directed to medical personnel and does not name an agent
- **Funeral Directive:** Like other directives, a Funeral Directive will make sure your loved one's wishes are respected. If those wishes are not recorded in a legal document, the law may default to

allow "next of kin" to make decisions for him or her after death. If you are legal LGBT spouses or registered domestic partners, your ability to make decisions will probably be respected, but documenting who should be in charge and what the arrangements should look like can prevent conflict. For more information, see Lambda's Legal Tools for Protecting Your Wishes for Your Funeral.

- **Hospital Visitation Directive:** A Hospital Visitation Directive designates who may or may not visit someone in the hospital. Sometimes covered in the Durable Power of Attorney for Health Care or Advance Health Care Directive, it is best for LGBT patients to prepare a separate document clearly stating their desires. In 2010, President Obama issued a federal mandate guaranteeing visitation rights to LGBT domestic partners and families of choice in hospitals and care facilities receiving support from Medicare and Medicaid (virtually all facilities).

Resources

Southern Caregiver Resource Center
3675 Ruffin Road, Suite 230
San Diego CA 92123
(858) 268-4432 | (800) 827-1008 (in CA)
E-mail: scrc@caregivercenter.org
Web Site: www.caregivercenter.org

The Southern Caregiver Resource Center offers services to family caregivers of adults with chronic and disabling health conditions and is for residents of San Diego and Imperial counties. Services include information and referral, counseling, family

consultation and case management, legal and financial consultation, respite care, education and training, and support groups.

**Family Caregiver Alliance
National Center on Caregiving**
(800) 445-8106 | (415) 434-3388
Website: 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.

National Center for Lesbian Rights (NCLR)
www.nclrights.org

NCLR gains and protects the legal and human rights of lesbians, gay men and bisexual and transgender people across the United States through impact litigation, public policy advocacy, public education and direct legal services. NCLR provides attorney referrals for seniors.

Transgender Law Center
www.transgenderlawcenter.org

The Transgender Law Center (TLC) is a civil rights organization advocating for transgender communities. TLC connects transgender people and their families to technically and culturally competent legal services and increases acceptance

and enforcement of laws and policies that support transgender communities.

Bay Area Lawyers for Individual Freedom
www.BALIF.org

BALIF is the oldest and largest LGBT Association of lesbians, gay men, bisexuals, transgendered persons and their supporters. It is a helpful resource for information about laws affecting the greater LGBT community. BALIF provides attorney referrals for seniors.

Lambda Legal
www.lambdalegal.org

Lambda Legal 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.

Open House
www.openhouse-sf.org

Open House enables San Francisco Bay Area LGBT seniors to overcome the unique challenges they face as they age by providing housing, direct services and community programs. LGBT seniors are empowered to improve their overall health, well-being and economic security.

National Academy of Elder Law Attorneys
www.naela.org

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

This fact sheet was rewritten (2015) 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). © 2002, 2011, 2015 Family Caregiver Alliance. All rights reserved.

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